

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-7364

UNITED STATES COURT OF APPEALS

For The Second Circuit

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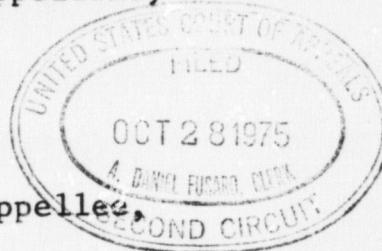
GIUSEPPE DI FORTUNATO,

Appellant,

- against -

STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND,

Appellee,



REDERI A/B SATURNAS,

Third Party Plaintiff,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

R
Pls

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

(Cover page 1)

PAGINATION AS IN ORIGINAL COPY

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Docket Entries

7/27/72	Complaint filed. Summons issued.	1JS5
11/8/72	Summons returned & filed/executed	2
12/11/72	Answer filed.	3
12/11/72	Deft's interrogatories to pltff filed.	4
12/18/72	Deft's notice to take pltff's deposition filed.	5
1/26/73	Pltff's answers to deft's interro- gatories filed.	6
4/11/73	Before Judd, J. - Case called for p/t conf. - P/t conf. held & concluded - Case adjd. to 6/4/73 at 4:00 P.M. for 2nd p/t conf.	
4/16/73	By Judd, J. - Order dtd. 4/13/73 granting defts. application for leave to make International Terminal Operacing Co., Inc. a third-party deft. filed. (p/c mailed to attorneys)	7
4/23/73	Third party complaint filed - Summons issued	8

Docket Entries

Docket Entries

3/4/74 Before JUDD, J. - Case called -

Adj'd. to 5/6/74

5/6/74 Before JUDD, J. - Case called -

Adj'd. to 6/24/74

6/24/74 Before JUDD, J. - Case called -

Adj'd. to 9/16/74

9/16/74 Before JUDD, J. - Case called and

marked off.

1/17/75 Reply to Counterclaim filed (by deft.

and third party pltff)

14

1/21/75 Before JUDD, J. - Case called - All

sides present - Trial ordered and begun -

Following jurors selected and sworn -

Trial cont'd 1/22/75

1/22/75 Trial Brief of Deft. and Third Party

Pltff. filed

15

1/22/75 Before JUDD, J. - Case called - All

sides present - Trial resumed - Trial

cont'd to 1/23/75

Docket Entries

Pltff rests - Deft's motions to dismiss

argued - Motions denied - Trial cont'd

1/24/75

1/24/75 Before JUDD, J. - Case called. Trial
cont'd to 1/27/75

1/27/75 Before JUDD, J. - Case called - All sides
present - Trial resumed - Third party deft.
opens - Deft. rests - Third Party's motion
to dismiss argued - Motion denied - Trial
cont'd to 1/28/75

1/28/75 Before JUDD, J. - Case called - All sides
present - Trial resumed - All sides rest -
Defts. renew all motions to dismiss -
Motions denied - Pltff's motion for a
directed verdict - Motion denied - Case
cont'd to 1/29/75

1/29/75 Deft's Suppl. Memorandum of Law filed.

1/29/75 Deft and Third Party pltff's Memo-
randum of Law filed.

1/29/75 Deft. and Third Party Pltff's Memo-
randum of Law filed.

Docket Entries

1/29/75 Preliminary Requests to charge respectfully submitted on behalf of the deft. and third party pltff. filed.

1/29/75 Third party deft. International Term. Operating Co., Inc.'s Additional Requests to Charge filed.

1/31/75 Before JUDD, J. - Case called - All sides present - Trial resumed - All sides sum up - Judge charges jury - Alternate discharged - Marshal sworn - Order of Sustenance signed - Jury retires to deliberate - Jury returns at 3:45 and returns a verdict for the deft. and against the pltff. and for the third party deft. against third party pltff.- Jury discharged - Trial concluded - 2 weeks for third party pltff and third party deft. to file briefs or issue of counsel fees - Judgment to be entered

1/31/75 By JUDD, J. - Order of Sustenance dated 1/29/75 filed.

1/31/75 Form of Verdict filed.

Docket Entries

1/31/75 JUDGMENT ON JURY VERDICT dated 1/30/75
 filed that the verdict is for the deft.
 and against the pltff. and for the third
 party deft. and against the third party
 pltff. and that pltff. recover nothing
 of deft. and that pltff pay costs when
 taxed and that the case is dismissed. 29

2/4/75 Notice of Motion, ret. 2/14/75 filed re:
 rejecting the advisory jury verdict on
 the issue of the third party pltff's
 entitlement to indemnity from third
 party deft., etc. 30

2/4/75 Deft. Third Party pltff's Memorandum
 of Law filed. 31

2/5/75 Stenographer's transcript of 1/29/75 filed. 32

2/10/75 Cross-notice of motion for an order
 accepting the advisory jury's verdict
 on the third party action, etc., ret.
 2/14/75 filed. 33/34

2/13/75 Third party pltff's reply memorandum filed. 35

Docket Entries

2/14/75	Before JUDD, - Case called. Third party deft's motion for an order pursuant to Rule 50 submitted. Decision reserved.	
2/18/75	Notice of Motion ret. 2/28/75 for an order setting aside and vacating the verdict in favor of deft. etc. filed.	36
2/18/75	Pltff's memorandum of law in support of motion to set aside verdict filed.	37
2/24/75	Affidavit of William P. Kain, Jr. filed.	38
2/24/75	Deft. Third party pltff's Memorandum of Law filed.	39
2/28/75	Before JUDD, J. - Case called - Adjd. to 3/7/75	
3/7/75	Before JUDD, J. - Case called - Both sides present - Motion argued - Decision reserved.	
5/22/75	By JUDD, J., - Order, Memorandum and Decision dated 5/22/75 filed that pltff's motion for a new trial be denied, and that judgment be entered in favor of third party pltff. Reversi A/B Saturnas against third	

Docket Entries

deft. International Terminal Operating Co., Inc. for the amount of its attys fees in the defense of the action, in an amount which may be agreed by the parties, or fixed by the court on three days notice in the event of the parties inability to agree within twenty days after the date of this memorandum. Copy of the Order mailed to the attys.

40

41

8/25/75 Copy of Civil Appeal scheduling Order
that appeal be filed by 9/9/75, etc. filed. 42.

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COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
GUISEPPE DI FORTUNATO,

Plaintiff, : 72C 1441

-against- : PLAINTIFF DEMANDS
STOCKHOLM REDERI A/B SVEA,
"M/V SVENSKUND", : TRIAL BY JURY

Defendant. :
-----x

Plaintiff for his complaint respectfully sets forth as follows:

FIRST: That at all times hereinafter mentioned the plaintiff was and is a citizen of the United States and of the State of New York residing at 2915 Avenue M, Brooklyn, New York.

SECOND: Upon information and belief that at all times herein-after mentioned the defendant was a foreign corporation with a place of doing business located at 90 West Street, New York, New York.

THIRD: Upon information and belief that at all the times herein-after mentioned the defendant was the owner of the "M/V SVENSKUND."

FOURTH: That at all the times hereinafter mentioned the said defendant operated, controlled, manned and provisioned the said vessel.

COMPLAINT

FIFTH: That on or about the 27th day of October, 1970, the said vessel was moored at Pier 21st Street, Brooklyn, New York.

SIXTH: That on or about the 27th day of October, 1970, the said defendant had engaged the services of International Terminal Operating Co. to perform stevedoring operations aboard the "M/V SVENSKUND."

SEVENTH: That on or about the 27th day of October, 1970, while plaintiff GUISEPPE DI FORTUNATO was lawfully aboard the "M/V SVENSKUND" as an employee of International Terminal Operating Co., he was caused to sustain severe and permanent personal injuries through no fault or want of care on his part but solely as a result of the carelessness and negligence of the defendant, its servants, agents, and/or employees, in failing to provide the plaintiff with a safe place to work and/or the failure of said defendant to provide plaintiff with a seaworthy vessel.

EIGHTH: That as a result of the foregoing plaintiff was disabled and endured great pain and suffering, required medical care for the alleviation and cure of his injuries and was compelled to forego his customary occupation and recreation all to his damages in the sum of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS.

NINTH: That this honorable court has jurisdiction over the parties herein and the subject matter of this action pursuant to sections 1332 and 1333 of the United States Code.

COMPLAINT

WHEREFORE, plaintiff demands judgment in the sum of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS together with costs and disbursements of this action against the defendant herein.

Dated: October 27, 1972
Brooklyn, New York

Yours, etc.,

IRVING B. BUSHLOW
Attorney for Plaintiff
26 Court Street
Brooklyn, New York 11201
MA 5-1336

ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
GUISEPPE DI FORTUNATO,

Plaintiff, : 72 Civ. 1441

against -

: ANSWER

STOCKHOLM REDERI A/B SVEA,
"M/V SVENSKUND",

Defendant. :

-----x
Defendant Rederi A/B Saturnas, sued herein as Stockholm Rederi A/B Svea "M/V Svenskund", by its attorneys, Haight, Gardner, Poor & Havens, answering the complaint of the plaintiff herein, respectfully alleges upon information and belief, as follows:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs FIRST and NINTH of the complaint.

SECOND: Admits that defendant, Rederi A/B Saturnas, was and still is a foreign business entity, organized and existing under and by virtue of the laws of a foreign country with its principal office in Stockholm, Sweden, but, except as so specifically admitted, denies each and every allegation contained in Paragraph SECOND of the complaint.

ANSWER

THIRD: Admits that at all the times mentioned in the complaint, defendant, Rederi A/B Saturnas, was the owner of the m/v Svenskund but, except as so specifically admitted, denies each and every allegation contained in Paragraph THIRD of the complaint.

FOURTH: Admits that at all the times mentioned in the complaint, defendant, Rederi A/B Saturnas, operated, controlled, manned and provisioned the m/v Svenskund, except for those parts and portions of the vessel, including her gear, equipment, appurtenances and appliances, turned over to stevedores, longshoremen and other independent contractors but, except as so specifically admitted, denies each and every allegation contained in Paragraph FOURTH of the complaint.

FIFTH: Admits the allegations contained in Paragraph FIFTH of the complaint.

SIXTH: Admits that on or about the 27th day of October, 1970, International Terminal Operating Co., Inc., was performing stevedoring operations aboard the m/v Svenskund under and pursuant to an agreement but, except as so specifically admitted, denies each and every allegation contained in Paragraph SIXTH of the complaint.

SEVENTH: Denies each and every allegation contained in Paragraphs SEVENTH and EIGHTH of the complaint.

ANSWER

FURTHER ANSWERING THE COMPLAINT AND FOR A FIRST, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT REDERI A/B SATURNAS, RESPECTFULLY ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

EIGHTH: Repeats and re-alleges each and every admission, denial and denial of knowledge or information hereinabove set forth with the same force and effect as if herein repeated and set forth at length.

NINTH: That if plaintiff suffered any injuries, as alleged in the complaint, the same were caused or contributed to by his own negligence and/or that of his fellow longshoremen, for whose actions defendant is not liable.

FURTHER ANSWERING THE COMPLAINT AND FOR A SECOND, SEPARATE, PARTIAL AND/OR COMPLETE DEFENSE THERETO, DEFENDANT, REDERI A/B SATURNAS, RESPECTFULLY ALLEGES UPON INFORMATION AND BELIEF, AS FOLLOWS:

TENTH: Repeats and re-alleges each and every admission, denial and denial of knowledge or information hereinabove set forth with the same force and effect as if herein repeated and set forth at length.

ELEVENTH: That plaintiff's employment had certain risks incident thereto which were obvious and well known to plaintiff at all the times of said employment and also when plaintiff first entered thereon, and said risks were

ANSWER

assumed by plaintiff; that whatever injuries plaintiff sustained in the course of said employment, which are complained of by the plaintiff herein, arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment and during the continuance thereof.

WHEATFOOT, defendant, Rederi A/B Saturnas, demands judgment dismissing the complaint of the plaintiff herein together with the costs and disbursements of this action.

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant, Rederi
A/B Saturnas sued herein as
Stockholm Rederi A/B Svea,
"M/V Svenskund"

By:

William P. Klein, Jr.
A Member of the Firm

One State Street Plaza
New York, New York 10004

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CHARGE OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DIFORTUNATO, :

Plaintiff, :

-against- : 72 C 1441

STOCKHOLM REDERI, :

Defendant. :

United States Courthouse
Brooklyn, New York

January 29, 1975
10:00 a.m.

Before :

HONORABLE ORRIN G. JUDD, U.S.D.J.

HENRI LeGENDRE
COURT REPORTER

16a

EXHIBIT "A" (OF PLAINTIFF'S MOTION PAPERS)

CHARGE OF COURT

[27]

2 | Appearances:

IRVING BUSHLOW, ESQ.
Attorney for Plaintiff

ALBERT TESTA, ESQ.
and
WILLIAM P. KAIN, JR., ESQ.
Attorneys for Defendant

— — —

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17a

EXHIBIT "A" (OF PLAINTIFF'S MOTION PAPERS)

1
2 THE COURT: Mr. Murphy and ladies and gentle-
3 men of the jury, we are now approaching the climax of
4 the case and now that we have heard the arguments by
5 counsel on both sides who spoke amicably to you, it
6 is my duty to give you the Court instructions on the
7 law that applies to the case.

8 The case involved some specific problems of
9 law but I hope that my charge will not be too difficult
10 to understand. I shall state first general rules
11 governing the weight of evidence, then particular
12 rules of law applying to this case and to the problem
13 of credibility, then a little about the facts, and
14 finally, instructions about reaching a verdict.

15 In discussing the particular rules of law, I
16 may make some comments on the evidence which has been
17 submitted. These comments will represent only my
18 interpretation of the facts, and are not binding on
19 you.

20 As far as the facts are concerned, nothing that
21 was said by counsel in their summation and nothing that
22 I may say is controlling, for your recollection of the
23 evidence governs and you are to decide the facts.

24 As for the law, it is your duty as jurors to
25 follow the law as I state it and to apply those rules

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EXHIBIT "A" (OF PLAINTIFF'S MOTION PAPERS)

2 to the facts of the case as you find them. You are
3 not concerned with the wisdom of any rule of law, but
4 it is your sworn duty to base a verdict upon the law
5 as stated in the instructions and the evidence found
6 by you.

7 You have been chosen and sworn as jurors in this
8 case to try the issues of fact presented by the
9 complaint of the plaintiff Giuseppe DiFortunato, and
10 the answer of defendant Stockholm Rederi, owner of the
11 vessel Vensgun, and against International Terminal
12 Operators, the Third-Party Defendant. You are to
13 perform this duty without bias or prejudice as to
14 either party. Your verdict may not be governed by
15 sympathy or prejudice.

16 All persons including corporations, stand equal
17 before the law and are to be dealt with as equals in
18 a court of justice. A large corporation has the same
19 rights as any other party.

20 As counsel said, the case before you really
21 constitutes two actions. The first by the plaintiff
22 against the shipowner, as the owner of the vessel which
23 he suffered injury; and second, the shipowner against
24 the stevedore who was the employee of the plaintiff.
25 The stevedore doesn't make any claim against the

4 plaintiff. The two actions are based on different
5 theories and they are separate but they are joined in
6 this action for the convenience of the Court and the
7 jury in order to avoid separate trials, which would
8 take longer.

9 We are in a civil action. The burden is on the
10 plaintiff in a civil action such as this to satisfy
11 you from a fair preponderance of the evidence of every
12 essential element of the plaintiff's cause of action.
13 If when you come to the question of fact you find the
14 scales balance evenly between plaintiff and defendant,
15 your verdict should be for the defendant. If, however,
16 you find that the balance tips toward the side of the
17 plaintiff, then your verdict must be for the plaintiff.

18 By a fair preponderance of the evidence it is
19 not meant that the plaintiff must produce a greater
20 number of witnesses than the defendant. The decision
21 rest on the quality of the evidence and not the quan-
22 tity, and the duty of the plaintiff to produce a
23 preponderance of evidence is satisfied if, taking
24 into consideration all the circumstances of the case,
25 the plaintiff has submitted credible evidence which
bears with you a greater conviction of truth than the
evidence presented by the defendant.

20a

EXHIBIT "A" (OF PLAINTIFF'S MOTION PAPERS)

2 In determining whether any fact has been proven
3 by a preponderance of the evidence, you may consider
4 the testimony of all witnesses both on direct and
5 cross-examination and all exhibits which have been
6 received in evidence which have been read from
7 depositions, or exhibits, or answers to interrogatories.
8 You have had all those types of evidence in this case.

9 The law does not require a degree of proof
10 which excludes all possibility of error and produces
11 absolute certainty, for such degree of proof is rarely
12 possible.

13 You are to consider only the evidence in the
14 case. As I told you at the beginning of the trial, you
15 may not draw any inference from an unanswered question
16 nor consider testimony which has been stricken out.
17 The nature of my rulings doesn't indicate one way or
18 the other whether the verdict should be for the defen-
19 dant or the plaintiff, or for the third-party defendant.

20 Now, when we come to the substantive law of the
21 case, the fact that a person has been hurt doesn't mean
22 that anybody has to pay for his medical care or for
23 his pain and suffering. The fact that Mr. Di Fortunato
24 was injured on a ship doesn't mean that the shipowner
25 is liable. The plaintiff has to show that there is a

21a EXHIBIT "A" (OF PLAINTIFF'S MOTION PAPERS)

2 legal responsibility on the person that he sues.

3 The action by the plaintiff as you have heard
4 is based on two separate theories. First, the negli-
5 gence of the shipowner and second, the unseaworthiness
6 of the vessel.

7 If you find for the plaintiff on either one of
8 these causes of action, you find for him; you don't
9 have to find both negligent and unseaworthy. You may
10 find both and you should render a verdict on both.

11 But the question whether the ship was unseaworthy is
12 a separate question that you don't draw an inference
13 from, one to the other, as to whether there is negli-
14 gence or whether there is unseaworthiness. You decide
15 each one separately.

16 Our federal jurisdiction here depends on two
17 things. First on the fact that this took place on
18 navigable waters -- it's what we call within the
19 admiralty jurisdiction of the Federal Court; and
20 secondly by a United States citizen against a Swedish
21 corporation, and the theory is that a foreign corpora-
22 tion can get a less prejudiced trial in a Federal Court
23 than he can in a State Court, whether that's still
24 true today, whether it's prejudice in the State Court,
25 has nothing to do with what our Constitution says.

22a

EXHIBIT "A" (OF PLAINTIFF'S MOTION
PAPERS)

4 When I come to the question of seaworthiness,
5 it doesn't mean a ship must stay afloat and continue
6 on its voyage. It means all parts of the ship and
7 its appurtenances must be reasonably fit for the
8 purposes they are intended to serve.

9 The plaintiff, who was a longshoreman working
10 in discharging cargo from the vessel is entitled to the
11 benefit of the warranty of seaworthiness. If the
12 vessel is unseaworthy, the shipowner is liable to the
13 plaintiff even if there was negligence on the part of
14 the stevedoring company for which the plaintiff was
15 working.

16 If the plaintiff longshoreman was negligent
17 and didn't take reasonable steps to protect himself
18 from danger, this doesn't bar him from recovering from
19 injuries that resulted from an unseaworthy vessel or
20 gear. This is different from the State Court.
21 Contributory negligence can be considered only to
22 reduce the charges which the plaintiff might otherwise
23 recover. And another rule is that a longshoreman does
24 not assume the risk of an unsafe place in which to
25 work or an unseaworthy condition.

You may consider these as bearing on contributory
negligence but you can't say that he didn't have any

23a
EXHIBIT "A" (OF PLAINTIFF'S MOTION
PAPERS)

right to work in a place that he knew was unsafe.

One other thing, plaintiff has the burden generally of showing both liability and damage by a preponderance of the evidence, but contributory negligence is a defense and defendant has to establish contributory negligence by a preponderance of the evidence to the extent that it relies on that defense. Seaworthiness requires only that a vessel be reasonably fit for her intended purpose. It doesn't require absolute perfection. It doesn't mean that the ship-owner must furnish an accident-proof ship. The work of a longshoreman is hazardous and he must bear the ordinary risk of his occupation, so that you can find recovery only if the accident resulted from unseaworthiness and not from the ordinary usual risk of plaintiff's job.

If you believe the evidence offered by the plaintiff that the deck in the 'tween decks, wherever he was working, was littered with flour, water and other things, you can find from that that it was not reasonably fit for use as a working surface, and therefore that the ship was unseaworthy.

If the shipowner accepted tapioca that was not in proper bags to carry it safely and it leaked when

24a
EXHIBIT "A" (OF PLAINTIFF'S MOTION PAPERS)

4 it got here, the shipowner can't say it was somebody
5 else's fault. The shipowner assumes the responsibility
6 for injuries that may result from a condition even in
7 the cargo that contributes to rendering the vessel
8 unseaworthy. And a requirement of seaworthiness
9 includes the equipment for loading and unloading.

10 There is evidence that some of the bags were
11 palletized and some were either loose or fastened
12 together with tapioca paste and not palletized. It is
13 for you to decide whether there was anything improper
14 about the way the goods were shipped that violated
15 the shipowner's use for a safe place to work and sea-
16 worthy equipment. It doesn't matter who was in
17 possession of the work area at the time that the
18 plaintiff was there. The evidence is that there was
19 nobody from the ship's crew or officers down in the
20 No. 3 hatch, that it was the stevedores that were
21 working there and in charge, but no matter who has
22 control to the work area or where the work is being
23 performed, the shipowner is liable for an unseaworthy
24 condition, whether you think that's fair or not, that's
25 the law you have to apply.

26 The mere presence of a temporary condition
27 doesn't in itself render a vessel unseaworthy. You

2 have to find if there was tapioca or litter on the
3 floor that the vessel because of that was not rea-
4 sonably fit for its intended use.

5 And when you come to the issue of negligence
6 you have to find in order to establish liability for
7 negligence against the shipowner, not only that an
8 unsafe condition existed but that the vessel owner
9 had notice of the condition for a sufficient length
10 of time to have taken remedial action. Notice however
11 is not limited to actual notice. We have something
12 that is called constructive notice, and if the cargo
13 officer --- there was some evidence was walking back
14 and forth along the deck, had a reasonable basis for
15 knowing that there was something wrong in the No. 3
16 hatch in connection with the working surface, you can
17 consider that as bearing on the issue of negligence.

18 We had some reference to safety regulations.
19 Those are binding on the stevedore. In fact, they are
20 made to guide the conduct of the stevedore but you
21 can consider them as bearing upon what is a reasonably
22 fit surface for work on a seaworthy ship.

23 United States Department of Labor in its Safety
24 and Health Regulations for longshoremen stated:

25 "That slippery conditions shall be eliminated

26a

EXHIBIT "A"

(OF PLAINTIFF'S MOTION
PAPERS)

as they occur." And since there is a non-delegable duty, that means a duty on the shipowner, even though he didn't create the unseaworthy condition, you can consider those safety and health regulations whether the non-performance resulted in unseaworthiness.

A shipowner doesn't have the burden of an insurer. As I say, he does not have to require an accident-proof ship. The standard is not perfection but reasonable fitness and that the vessel is seaworthy, when the vessel and its appurtenances are reasonably fit for their intended use.

To recover for negligence, the plaintiff must prove that the defendant either actually noticed or reasonably should have noticed the kind of dangerous condition and should have reasonably foreseen the possibility that someone might be injured as a result of it.

Every person has a legal duty to make reasonable use of his own senses in order to avoid injury to himself. Failure to do so is contributory negligence, but in an emergency, plaintiff is not required to select instantly the safest course of conduct or the safest spot.

You are to assume what a reasonable person would

27a EXHIBIT "A" (OF PLAINTIFF'S MOTION
PAPERS)

do, what a longshoreman with experience with conditions that existed here would have done.

If you find that plaintiff's negligence played any part in causing the accident, then you should find that he was contributorily negligent and determine the percentage of fault for the plaintiff and the defendant, and reduce his recovery by the percentage of fault which was contributable to him.

(Continued on next page.)

2 It could run anywhere from zero to a hundred
3 percent and there is no guide. It's up to your judge-
4 ment to decide.

5 If you find that he should have known that there
6 was tapioca there or that he did know, and that he
7 stepped on it, you may find that he was guilty of
8 contributory negligence, and if the injury resulted
9 only from his own negligence then he can't recover
10 against the defendant and your verdict should be for
11 the defendant.

12 The plaintiff is required to use reasonable
13 care to avoid any obvious or apparent hazard that he
14 actually knows exists.

15 I spoke about something that caused the accident.
16 We have a rule of proximate cause. An act or omission
17 is a proximate cause of an injury if it was a substan-
18 tial factor in bringing about the injury. There may
19 be more than one proximate cause of an accident. Where
20 two or more people by their separate and independent
21 acts cause an injury to another person, each is
22 responsible for the whole injury, even though his
23 act alone might not have caused the entire injury.

24 So, if the shipowner and the stevedore were
25 both negligent you still can find a verdict against

2 the shipowner on the basis of his negligence and
3 similarly with respect to contributory negligence.

4 If you find there was any contributory negli-
5 gence by Mr. DiFortunato, you should next determine
6 whether his negligence was a contributory cause of
7 the accident, and if so, what proportion of the fault
8 lay with him. As I said, the burden of proof is on
9 the plaintiff, if he doesn't sustain his burden on
10 this then you must find for the defendant.

11 I am going to say something about damages. I
12 am not giving any intimation what you should find for
13 the plaintiff. It is for you to decide on the evidence
14 presented and the rules of law I have given you whether
15 the plaintiff is entitled to recover from the defendant.
16 If you find that plaintiff is entitled to recover from
17 the defendant, you must render a verdict in a sum of
18 money which will justly and fairly compensate the
19 plaintiff for all loss proximately resulting from the
20 injuries he sustained.

21 Damages are divided into two categories, general
22 and special. If you find that there has been proof
23 of damages proximately resulting from the negligence
24 or unseaworthiness on behalf of the shipowner; special
25 damages include loss of earnings in the past, loss

2 of earnings in the future and medical expenses reasonably incurred in the past or expected to be incurred
3 in the future; general damages include compensation
4 as far as money, for pain, suffering, humiliation,
5 embarrassment; to enjoy his life without injury to his
6 person and body. You can't speculate on either damages
7 or liability, and you have to decide it on reasonable
8 inferences from the evidence that is before you.

9
10 And there is a duty on a person who is hurt not
11 to increase the damages, rather to mitigate them.

12 You must consider that if a plaintiff has been
13 hurt at work he's obliged to seek and accept such
14 employment that he's reasonably able to perform. You
15 should take into consideration the medical testimony
16 as to when plaintiff was able to return to work. If
17 he failed to return to work at a time that you determine
18 he was able to do so, you can't award damages for
19 lost earnings after that point of time. On the other
20 hand, if you find that he has suffered injuries that
21 are permanent, you can make an allowance in your verdict
22 taking into consideration the period of time that
23 elapsed from the date of injury to the present time,
24 and the period of time he can be expected to live.

25 In this connection, the actuary table shows a person

31a
EXHIBIT "A" (OF PLAINTIFF'S MOTION
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2 67 years of age, which is about plaintiff's age at
3 the present time, I believe he's between 66 and 67,
4 has a life expectancy of 12 years. These tables are
5 nothing more than statistical averages. They neither
6 assure the span of life that I have given you nor
7 assure the span of plaintiff's life will not be
8 greater. The life expectancy figure I have given you
9 is not binding upon you, but may be considered by you
10 together with your own experience and the evidence
11 you have heard concerning the condition of plaintiff's
12 health, his habits, employment and activities in
13 determining what the plaintiff's present life expec-
14 tancy is.

15 If you find that plaintiff is entitled to
16 recover in this action, he's entitled to recover the
17 amount of his reasonable expenditures for any medical
18 services, physician and hospital charges and X-ray
19 charges and the like.

20 Now, I should say something about the second
21 part of the cause of action which is by the shipowner
22 against the stevedore. The obligations of the steve-
23 dore are to the shipowner, are to perform workmanlike
24 services. The shipowner owed no duty that wasn't
25 provided by contract, but the terminal company owed the

4 company a duty to use proper care in the stevedoring
5 process, and its failure to use proper care, if you
6 find it would constitute a breach of the warrantee of
7 workmanlike service which would entitle the shipowner
8 to indemnity from International Terminal Operating
9 Company, and you can't apportion this, it's all or
nothing. It's not like the division that may exist
in contributory negligence.

10 If you find the vessel was unseaworthy and the
11 negligence of the stevedore brought the unseaworthiness
12 into play, that would still amount to a breach of the
13 stevedore's warrantee of workmanlike service and the
14 shipowner would be entitled to indemnity from the
15 stevedore. So if you find that the accumulation of
16 tapioca or debris was known to the stevedore, or should
17 have been known through its employees, including the
18 plaintiff, nevertheless went ahead with stevedoring
19 operations without cleaning up this condition, you
20 could find that this constituted a breach of the
21 warrantee of workmanlike service and the stevedore was
22 liable for indemnity.

23 The stevedore was bound, as a matter of law,
24 to comply with the safety, health regulations for
25 longshoremen which I described, and the regulations

2 say: "The responsibility for compliance with the
3 regulations --" This part is based upon employers.
4 The term shall indicate provisions that are mandatory
5 and with respect to housekeeping. It provides "slippery
6 conditions shall be eliminated as they occur, and
7 loose paper, dunnage and debris shall be collected as
8 the work progresses and be kept clear of the immediate
9 work area."

10 Now, the plaintiff worked for the stevedore, and
11 if the plaintiff was guilty of contributory negligence,
12 that is, some negligence on the part of an employer
13 stevedore, some negligence on the part of the plaintiff
14 that contributes to his own accident makes the employer-
15 stevedore liable to his breach of warranty of workman-
16 like service.

17 You are deciding two issues when you Pass on the
18 question of contributory negligence. Whether you find
19 for the plaintiff on the first set of issues, on the
20 basis of unseaworthiness or on the question of negli-
21 gence, makes no difference. In either event, you may
22 find that there is a right to indemnity from the
23 stevedore to the shipowner. If there is a condition
24 that resulted only from the work of the stevedore and
25 just temporarily, the stevedores argue that it should

2 not be liable. And there is a rule that if there is
3 something that the shipowner has done preventing the
4 stevedore from rendering workmanlike service, then
5 the stevedore is barred from recovery on its indemnity.
6 If they are both at fault the rule of contributory
7 negligence falls on the part of the shipowner, is not
8 enough to bar its right of recovery. And with respect
9 to the indemnity claim, the Court doesn't require
10 perfection in the performance of stevedoring service.

11 If you find the stevedore performed his work in
12 a reasonably workmanlike manner, then the stevedore
13 is not required to recover indemnity. If you find
14 that the stevedore didn't know that there was wet
15 tapioca or a dangerous condition that caused the
16 accident, then the stevedore is not at fault and then
17 you must find for the stevedore rather than for the
18 shipowner on the indemnity claim.

19 We next come to the important question of
20 determining the credibility of witnesses, which is one
21 of your major functions. While I will describe some
22 of the rules that you apply, it is not essentially
23 different from the task you face whenever people tell
24 you conflicting stories in order to induce you to take
25 action in your own affairs.

35d

F...AT "A" (OF PLAINTIFF'S MOTION
PAPERS)

2 In determining the weight to be given to the
3 testimony of a witness, you may take into consideration
4 his interest or lack of interest in the outcome of the
5 case, his age, appearance and manner of testifying,
6 the opportunity that he had to observe the facts about
7 which he testified, and the probability or improbability
8 of his testimony when viewed in the light of the other
9 evidence in the case, and your own knowledge and
10 judgment.

11 Inconsistencies in the testimony of a witness
12 or between the testimony of different witnesses may or
13 may not cause you to discredit testimony. Two or more
14 persons may give different versions of an incident or
15 transaction because of innocent errors in recollection,
16 and you may waive the effect of every discrepancy,
17 considering whether it relates to a matter of importance
18 or to an unimportant detail, and whether it results
19 from innocent error or intentional falsehood.

20 If you find that there has been any testimony
21 which you disbelieve, you have the right to reject a
22 witness' testimony in its entirety or to give the
23 balance of the testimony such credibility as you may
24 think it deserves.

25 If you find that a witness knowingly gave false

4 on a material matter, you have a right to distrust his
5 testimony in other particulars and you may reject all
6 of his testimony, or give any of the rest of it such
7 credibility as you may think it deserves.

8 Merely because of the testimony of the plain-
9 tiff or of a witness or witnesses for the plaintiff is
10 not contradicted by witnesses for the defendant, you
11 are not required to believe and accept such uncontra-
12 dicted testimony. You may accept it, but you are not
13 compelled to accept it. You may disbelieve or reject
14 the uncontradicted testimony of a witness even though
15 his credibility has not been impeached.

16 Even if testimony is uncontradicted, you need
17 not believe it if it violates your common sense.
18 Testimony which is incredible should be given no weight
19 by you at all.

20 Since plaintiff has an obvious financial
21 interest in the outcome of his case, you may consider
22 that fact in determining the weight and credibility
23 to be given plaintiff's testimony.

24 All these powers that you have in determining
25 credibility, determining facts, must be exercised in
good faith on reasonable inferences from the facts
that are before you, and not just on speculation.

2 To comment on evidence, as long as he makes it clear the
3 ultimate determination of the facts is the responsi-
4 bility of the jury. I am not going to try and outline
5 all the evidence. You heard three hours of it this
6 morning. I just want to give you some suggestions
7 about the issues that you are deciding and what you may
8 consider; and while I'll give you a formal verdict,
9 I'll follow a little different order than what's in
10 that form.

11 Your first issue is whether the defendant did
12 in fact slip on water or litter. It's not necessary
13 that it's as deep or as bad as the plaintiff made it
14 in his testimony. It's quite possible that the
15 plaintiff, testifying four years or more after the
16 event, is a little unclear in his mind, but it's
17 possible that there was more litter in the afternoon
18 than there was in the morning. I was a little confused
19 at the beginning about whether they were in fact drums,
20 whether it was palletized or unpalletized, and I found
21 out when we got to the ship's plan that there were drums,
22 but they were on deck and probably was discharged before
23 the four-hour job of discharging the tapioca began.
24 And it also appears that some of the tapioca was
25 palletized and some was unpalletized, and you can

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19 at the beginning about whether they were in fact drums,
20 whether it was palletized or unpalletized, and I found
21 out when we got to the ship's plan that there were drums,
22 but they were on deck and probably was discharged before
23 the four-hour job of discharging the tapioca began.
24 And it also appears that some of the tapioca was
25 palletized and some was unpalletized, and you can

2 determine whether the plaintiff's testimony, which did
3 indicate some uncertainty on this, was therefore false
4 or whether it was a reasonable degree of forgetfulness
5 after the period of time involved.

6 There was some corroboration of the fact of
7 the accident and there were no records to repudiate
8 it, although it was testimony that he reported it to
9 some timekeeper who was not produced here on the trial.

10 If you find that he slipped on litter then you
11 should find out whether it's all his fault. It could
12 have been a dangerous condition right along. He could
13 have gone along working to get the job done and he
14 could have forgotten at 1 o'clock or 1:15 how careful
15 he had been the rest of the morning and how careful he
16 had to be.

17 You can determine what extent that determines
18 contributory negligence, bearing in mind that he was
19 able to get around that desk some hours before, and
20 the other eight men in the hatch didn't fall.

21 I think from the worksheets -- it was nine men
22 in the hatch and not the 12, because the plaintiff was
23 not one of the eight in the gang, and if you determine
24 there was some contributory negligence then you decide
25 whether it's 10 percent or 20 percent or 100 percent or

2 somewhere in between.

3 If you find the accident did happen and that
4 it was not all the plaintiff's fault, then you decide
5 first whether the Svenskund was unseaworthy. Was
6 there a safe place to work? Should there have been
7 a cooper there? A cooper would have been employed by
8 the stevedore but his function was partly to do the
9 shipowners work, seeing to it that there was a safe
10 place to work; or after you decide the question of
11 unseaworthiness, were the officers with the Svenskund
12 negligent? Should they have known what the condition
13 was down there, if it existed. They couldn't tell a
14 longshoreman to stop working, all they could do is com-
15 plain to the proper superintendent and let their
16 complaints go through channels. And you can bear in
17 mind that there are no ships officers here, partly
18 because it's a Swedish and there may have been some
19 inconvenience in bringing them here. We don't know why
20 they are not here.

21 Then if you find that there was an accident,
22 it was not 100 percent contributory negligence, that
23 the ship was either unseaworthy or its officers
24 negligent, then you have to determine whether the
25 stevedore was liable. Did it fail to keep this place

2 reasonably fit for work? Did the shipowner in any way
3 prevent the stevedore from keeping the place reasonably
4 safe to work.

5 I am leaving damages for the last, although
6 they come last, I thought we would go through the
7 liability functions first.

8 If you ~~find~~ that there is grounds for recovery
9 for the plaintiff, then you go into the amount of
10 damages; first, medical expenses, \$120, \$125 for a
11 doctor to testify in court, not for treatment, to make
12 an examination preparatory to testifying. You can
13 decide whether to add that to the \$1880. Then you
14 decide when should he have gone back to work. Should
15 it have been in December 1970? Is he still unable to
16 work or should he have been able to go back to work
17 some other time? Then you have to decide that on the
18 basis of the evidence that you have heard, without
19 guesswork, and award what you think is a fair amount
20 for lawful wages during the time before he returned to
21 work.

22 Now, the guaranteed annual income is a factor
23 in two ways. First, in determining whether he had
24 enough coming in so he wasn't in any hurry to go back
25 to work even if he could; and second, whether that is

2 something that should be deducted. In a sense it was
3 earned before he was hurt. So it's not an automatic
4 deduction. You don't need to consider any claim against
5 the employer. If there is any adjustment as to that,
6 that's an entirely separate matter. Then you go into
7 pain and suffering in two parts, pain and suffering
8 to date, up to the present time; and that includes
9 suffering from depression.

10 If you find that this is real and it's for you
11 to determine whether he did suffer from depression,
12 whether the pain continued after the X-rays show that
13 they might have stopped.

14 Dr. Rovit, the impartial doctor, said he had
15 made no determination as to whether the plaintiff was
16 faking, and you can assume the reason why you are here
17 deciding this case, nobody but you can agree whether
18 the pain and suffering and depression was real or
19 whether it was fake. It's your responsibility to do
20 that in a manner that's fair to the plaintiff and
21 in a manner that's fair to the people who are giving
22 him money. I am not telling you.

23 Then after you decide pain and suffering, if
24 you find there is permanency you can give a figure
25 for pain and suffering during the balance of his life

2 expectancy. You could do it on a lump sum X dollars
3 per year. Injuries have wide latitude and when you
4 come in you come in with a figure as to medical expenses,
5 loss of earnings, past and future, pain and suffering.

6 In saying all this, I'm trying to give you some
7 guidance, I'm not intending to express how you should
8 decide any of the issues of fact, that's why we have
9 a jury.

10 You have listened attentively and have had the
11 questions presented fully to you clearly by counsel.
12 The theory of our law is that six impartial people
13 hearing the evidence, with the benefit of the arguments
14 of counsel and the Court's instructions on the law,
15 are best able to resolve dispute of fact better than
16 any other machinery that exists anywhere else. You
17 bring into the jury room, into the courtroom, all the
18 experience and background of your lives. In your
19 everyday affairs you determine for yourselves the
20 reliability or unreliability of statements made to you
21 by others on all sorts of subjects. The same tests
22 that you use in your everyday dealings are the tests
23 which you should apply to your deliberations.

24 You don't check your common sense outside the
25 door. You can't guess and you can't decide on the

2 basis of something that you know that wasn't brought
3 into evidence here, but you can make common sense
4 inferences from facts which have been established.

5 When you go into the jury room, Mr. Murphy,
6 Juror No. 1, will serve as Foreman and guide your
7 deliberations and determine when and how to take a
8 vote. He should try to see that everyone gets a chance
9 to be heard and that not more than one person talks
10 at a time.

11 Your verdict must represent the considered
12 judgment of each juror, and your verdict must be unan-
13 imous.

14 In reaching a decision, it is your duty as
15 jurors to consult with one another, to deliberate with
16 a view to reaching agreement, and to reach a verdict.
17 If you can do so without violence to individual judg-
18 ment. Each of you must decide the case for yourself,
19 but you should do so only after an impartial considera-
20 tion of the evidence in the case and the interpretation
21 that other jurors give to the evidence.

22 If you want to see any of the exhibits, they
23 can be sent up to you. If there is some particular
24 part that you think is important where you can't agree
25 what it says, you can send out a note, we'll try and

2 find a place in the note where it is and get the
3 parties together and have the court reporter read it.
4 It's so time-consumed in that. We have consumed a
5 lot of time. I never had a case with seven doctors in
6 it before. I think you all know a lot more about it
7 than you did.

8 It's important that you decide it as accurately
9 as you can. I have a formal verdict here which
10 prevents the formal questions and I'll give that to the
11 Foreman.

12 When you reach a verdict the Foreman should
13 report to the Marshal, who will be sitting nearby,
14 and give him a written message. After you come into
15 court and the parties may poll the jurors and make
16 sure it is in fact a unanimous verdict of 12 jurors.
17 If you want any instructions clarified give a note to
18 the Marshal and I'll call you in.

19 I may call you back if there are things that I
20 misstated the parties think are important, but I'll
21 assume that you're going now to deliberate.

22 Remember in your deliberations that the parties
23 and the Court rely upon you to give full and conscien-
24 tious deliberation and consideration to the issues
25 and evidence before you. By so doing, you carry out

2 to the fullest your oath as members of the jury to
3 try the issues in this case well and fairly and to
4 render a true verdict as part of our American system
5 of justice.

6 (Whereupon, two United States Marshals were
7 sworn in by the Clerk of the Court.)

8 THE COURT: Mr. Stat, you can go in and get
9 your things and get your card from the Clerk and go
10 back downstairs.

11 If you think you will reach a verdict by six,
12 6:30, you decide the time that you think you want to
13 adjourn, I'll be here until 6 if I don't hear from you.

14 (Whereupon, jurors were excused from the court-
15 room.)

16 (Continued on next page.)

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Post-charge colloquy

41Lhb

1 All right, Mr. Bushlow, any exceptions?

2 MR. BUSHLOW: No exceptions.

3 THE COURT: Mr. Kane?

4 MR. KAIN: I have two, not necessarily exceptions.

5 If your Honor please, your Honor charged the jury
6 with respect to cargo, pointed out they need to be
7 seaworthy. I would ask your Honor to expand --

8 THE COURT: I think I said reasonably and not
9 perfect. I'll keep it in mind if they come in.

10 MR. KAIN: I request your Honor to charge the
11 jury that the amount of the medical has been stipulated
12 to and that they are therefore unable to return any
13 different amount than the stipulated amount between
14 counsel.

15 THE COURT: I wasn't sure what our understand-
16 ing was about the \$125. That's the only question.

17 MR. KAIN: If you honor --

18 THE COURT: That's the only other item.

19 MR. KAIN: It's still open to an interpretation,
20 that perhaps the jury might say in the future he may
21 need additional medical expenses or something of that
22 sort. If your Honor would say they may determine
23 whether -- but as to the actual medical expenses counsel
24 has stipulated that this is \$1810, that that's the
25 reasonable value. With respect to that, I submit that

1 they are bound by that stipulation and perhaps if your
2 Honor wishes, the \$125 is open to conjecture by the
3 jury. I would ask your Honor to tell the jury that's
4 the maximum.

5 THE COURT: I didn't say it in those words.
6 I don't think that's going to be a major issue.

7 Mr. Testa, what have you?

8 MR. TESTA: I would take exception to your
9 Honor's charge the shipowner is liable -- under the
10 Ossner case that's not so.

11 THE COURT: I said the Ossner case does not
12 apply, and the evidence really doesn't sustain it.

13 MR. TESTA: I am only excepting to that. The
14 manner you charged them is not correct under the Ossner
15 case.

16 THE COURT: Overruled.

17 MR. TESTA: I will take exception to that
18 portion of your Honor's charge; if they find that the
19 deck was littered with flour and water they could find
20 the ship unseaworthy. They can find the ship unsea-
21 worthy if that condition made the deck unfit for the
22 purpose for which it was intended.

23 THE COURT: I could have expanded. The statement
24 I think I said it was a question of reasonable fitness.
25 I won't expand on that.

1 MR. TESTA: I would take exception to that
2 portion of your Honor's charge where if the negligence
3 of the stevedores brought the negligence in play, the
4 shipowner is entitled to indemnity. There is no
5 evidence of that.

6 THE COURT: I think that was a request that
7 Mr. Kain put in.

8 MR. KAIN: Assuming this condition was as
9 Mr. Testa is contending present when the ship came into

10 MR. TESTA: I wanted to take an exception.

11 MR. KAIN: It certainly is an applicable charge
12 in this case.

13 THE COURT: I'll overrule the exception.

14 MR. TESTA: I just wanted to take an exception.

15 THE COURT: You are taking it for the record.

16 MR. TESTA: As to my position on that. The
17 condition already existed so there is no testimony in
18 this case that any action of the stevedore brought it
19 into play.

20 THE COURT: I think negligence of omission might
21 be involved. For that reason also I overrule the
22 exception.

23 MR. TESTA: I take certain comments your Honor
24 made with reference to the evidence in this case.
25 The shipowner only complained through proper channels.

1 There was testimony by Mr. DeSantis that the shipowner
2 could do something about remedying this. I think by
3 making that comment is telling the jury or charging
4 them the shipowner could do anything except complain,
5 and that's not the testimony in this case.

6 THE COURT: You mean the shipowner could stop --
7 part of the complaints would be to stop the unloading
8 until he had time to make the --

9 MR. TESTA: Mr. De Santis and Mr. Keeler both
10 testified that the ship could turn the crew to work
11 and clean up the condition.

12 THE COURT: That's the exact opposite of the
13 original testimony that the crew would not be permitted
14 to do anything.

15 MR. TESTA: I am only saying that there was
16 testimony to that effect. Your Honor in making that
17 comment would make the jury believe that the ship could
18 only complain through proper channels. That's all I'm
19 saying. I think there was testimony that he could do
20 something. I'll take exception to that part of your
21 Honor's charge where you say the stevedore had some
22 obligation to keep working the area. I think that's
23 it.

24 THE COURT: I think it's a joint responsibility.

25 MR. TESTA: I would take exception to that.

1 Under the law the obligation is that of the shipowner
2 to furnish a safe place.

3 THE COURT: It's a joint -- I interpret it to
4 be a joint operation at this stage.

5 MR. TESTA: I'll take exception.

6 With respect to future pain and suffering, if
7 they make any such finding with respect to future pain
8 and suffering that this must be reduced to present
9 value by application of the --

10 MR. KAIN: I should have picked that up. May I
11 join in that exception.

12 MR. TESTA: They just can't speculate for the
13 next 12 years that he's entitled to whatever without
14 reducing it by the discount factor.

15 THE COURT: I never gave the discount factor --
16 and you get into the inflation factor and you don't
17 know where you end up.

18 MR. BUSHLOW: I would join in the request. The
19 courts have held that five percent is a reasonable
20 discount factor.

21 MR. KAIN: Six.

22 MR. BUSHLOW: Then it would be six percent.

23 THE COURT: If you want it done.

24 MR. KAIN: That's only with respect to future
25 amount after today.

1 MR. TESTA: I would also take exception to that
2 portion of the charge, there is testimony in this case
3 that this man retired in January 1973, and I don't
4 think they should be permitted to speculate as to
5 future lost wages.

6 THE COURT: It's not likely.

7 MR. TESTA: I don't think they should speculate
8 on future lost wages in view of the fact that he
9 retired two years ago.

10 THE COURT: The retirement was not necessarily
11 voluntarily.

12 MR. TESTA: He could have applied for a dis-
13 ability pension. He has the option one way or the
14 other, and he applied for one as to age.

15 THE COURT: I don't go along on that.

16 MR. TESTA: I would also think that the jury
17 should be restricted to the point of time, the date of
18 the accident, and the time that he retired. This is
19 the time that he sustained an accident.

20 THE COURT: Mr. Bushlow tried to carry it in to
21 the present day, and I gave the jury an option of some-
22 time in between, in between December of 1970 and the
23 present date; and the retirement date is one of the
24 options. I am not going to restrict it.

25 MR. TESTA: Those are the exceptions I have.

1 MR. BUSHLOW: Your Honor, you did mention the
2 cargo officer aboard ship, whether he would have
3 noticed but you failed to notice Mr. Keeler's testi-
4 mony. I don't know how important it is, during the
5 voyage, because of the temperature changes they should
6 have sent somebody down there, and that would also
7 be a reasonable opportunity to have notice of the
8 condition in the hatch.

9 THE COURT: I said I didn't purport --

10 MR. KAIN: I do recall this, that your Honor
11 specifically mentioned that there was testimony that
12 during the voyage perhaps somebody should have gone
13 down into the hatch.

14 THE COURT: I may have.

15 MR. BUSHLOW: No. 2, your Honor, I would ask
16 you to please charge the jury, if you find the
17 defendant's co-employees or superiors, or his employer
18 were negligent, in any respect, such negligence is
19 not to be imputed to the plaintiff and he's not
20 chargeable to it.

21 THE COURT: I think I intended to give it. I
22 think that's one of your requests.

23 MR. BUSHLOW: I know you did but you forgot.
24 Outside of that I have no further requests. Are you
25 going to give that charge?

1 MR. TESTA: I was under the impression that you
2 were going to charge my request No. 7. You indicated
3 you were going to charge it.

4 THE COURT: I didn't give it in those words.

5 MR. TESTA: I was under the impression if the
6 vessel is unseaworthy that would be conduct including
7 indemnity.

8 THE COURT: I gave the substantive charge except
9 the last part. I'll repeat it.

10 MR. TESTA: As I wrote it down you just said if
11 the shipowner's conduct hinders performing in a work-
12 manlike manner -- I think that's a little different than
13 saying it was in seaworthy condition.

14 THE COURT: I'll read seven. Anything else?
15 Bring in the jury.

16 (Whereupon, the jurors re-entered the courtroom
17 and are now seated in the jury box.)

18 THE COURT: Mr. Murphy and ladies and gentlemen,
19 I have agreed to make just a few supplements to my
20 charge.

21 I spoke about the duty of the shipowner to see
22 that the cargo containers are such that they wouldn't
23 cause an unseaworthy condition, and there, too, the rule
24 applies they must be reasonably fit for their purpose.

25 On the medical expenses I may have read the

1 standard charge. It talks about future medical
2 expenses. I think there is no claim for future
3 medical expenses, so the stipulated amount is \$1880,
4 and there is another \$125 that you may or may not
5 determine to include.

6 With respect to future pain and suffering, there
7 is also a rule that can be applied; pain and suffering
8 in the future is not going to be felt right now, and
9 if you give a verdict payable right now you should
10 take a five percent discount per year on anything
11 that you give for the future in reducing it to present
12 value in giving a verdict now.

13 The parties are agreed that that is the rule
14 that is to be applied here.

15 My attention was called to various things that
16 I did not say in studying the issues you should decide
17 and the facts. and certainly as I tried to make clear,
18 I was not trying to summarize all the evidence, and
19 the evidence that I left out, much of it may be
20 important to you. You give weight to anything you
21 recall that is pertinent to the issues.

22 I didn't state with respect to contributory
23 negligence, as I should have done; that contributory
24 negligence, if you find it means Mr. DiFortunato's own
25 negligence, the negligence of any other stevedore or

any employee of the stevedore is not imputed to him.
That does not constitute negligence on his part. And
I read only part of the charge with respect to indemnity.
I should say, if the vessel's unseaworthy condition
prevented the stevedore from performing its services
in a workmanlike manner, that would be conduct on the
part of the shipowner sufficient to preclude recovery
of indemnity and it would excuse even a negligent act
by the stevedore.

(Continued on next page.)

1 I have given you a lot of law, some of which
2 may be abstract, you determine how much applies to the
3 facts as you find them. If you need anything more,
4 let me know. Thank you.

5 (Whereupon, jurors were excused from the court-
6 room.)

7 THE COURT: May I have a stipulation on the
8 record that any exhibits in evidence that the jury
9 asks for can be sent in. I am going back to chambers.
10 I guess we're all New Yorkers, if you go very far it
11 may be difficult if the jury is going to ask questions.
12 Open the attorney's lounge so people can sit down.

13 (Whereupon, Court stood in recess.)

14 (After recess, Court resumed at 3:05 p.m.)

15 THE COURT: The first note, about 20 minutes ago,
16 asked for the stowage plan and the work report. Now
17 I have a note, if we answered questions one and two,
18 must we answer other questions.

19 Question three says: "If your answer to (1) or
20 (2) is in the affirmative, was such negligence or
21 unseaworthiness a proximate cause of plaintiff's
22 accident?"

23 Either they didn't understand or they found a
24 defendant's verdict on the other two. I suppose if the
25 implication is one or two they don't have to answer the

1 other two.

2 MR. KAIN: Yes, we still have the question of
3 contributory negligence. To some extent if they found
4 that no accident happened, I submit to your Honor,
5 that the shipowner could, assuming they found the
6 plaintiff was contributorily negligent, which is an
7 issue your Honor has severed from this particular
8 aspect of the case --

9 MR. TESTA: If they found that, is the shipowner
10 entitled to indemnity?

11 MR. KAIN: I say if they find -- obviously I'm
12 not entitled to indemnity if they found in the negative
13 in the first two questions, except for legal fees
14 and disbursements.

15 When you say indemnity --

16 MR. TESTA: Indemnity includes counsel fees.
17 I don't think the jury should answer the one question
18 as to the contributory negligence.

19 MR. KAIN: I think that would be totally
20 confusing.

21 MR. TESTA: I don't think so. I think they
22 might resolve the question whether you are entitled to
23 counsel fees or not. This all might be academic.

24 MR. KAIN: But the question clearly indicates
25 either of the first two questions is answered in the

1 affirmative.

2 MR. TESTA: I think all your Honor could do is
3 read (3) to them again.

4 THE COURT: Well, I haven't gone into the ques-
5 tion of counsel fees with them at all yet. That's
6 the reason for doing that.

7 MR. KAIN: Your Honor granted an application to
8 sever the issue of counsel fees.

9 MR. TESTA: If they find contributory negligence
10 then he would be entitled to indemnity for counsel fees.

11 MR. KAIN: Even if the first two questions were
12 answered in the affirmative --

13 MR. TESTA: But I say if they answered the
14 question, I say they should answer it even though the
15 amount of counsel fees is reserved to your Honor. The
16 right to a counsel fee has not been reserved by the
17 Court. That's to be --

18 MR. KAIN: Of course my contention is, your
19 Honor, that it has been reserved for your Honor.

20 MR. TESTA: Oh, no.

21 MR. COURT: I'll have to give them a new charge
22 charging indemnity. I'll tell them No. 5. Assuming
23 this is what they mean. Bring them in, please.

24 (Whereupon, the jurors re-entered the courtroom
25 at 3:35 p.m.)

1 THE COURT: Mr. Murphy, I have your note, "If
2 we answer questions one and two, must we answer other
3 questions?" Question No. 3 says, "If your answer to
4 (1) or (2) is in the affirmative, was such negligence
5 or unseaworthiness a proximate cause of plaintiff's
6 accident?" If you answer (1) and (2), then you think
7 you don't answer anything more. Then we have a problem
8 whether the shipowner gets his counsel fees back from
9 the stevedore, and for that purpose No. 5: "Did any
10 negligence on the part of the plaintiff contribute to
11 his accident," is of some significance. Whatever your
12 answers are, answer No. 5. If you answer (1) and (2),
13 then you answer all the rest of the questions.

14 I suppose you go back and work on that.

15 || Mark this, please.

16 THE CLERK: Jury note marked as Court Exhibit 2.
17 (Whereupon, jurors were excused from the court-
18 room.)

19 MR. TESTA: If your Honor please, are you going
20 to submit the other questions whether the shipowner
21 is entitled to indemnity?

22 THE COURT: No. I'll look at that as an advisory
23 question.

24 (Whereupon, Court stood in recess.)

25 (After recess.)

1 THE CLERK: Jury note marked Court Exhibit 3.

2 THE COURT: The jury reached a verdict. Bring
3 them in and we'll see what they report.

4 (Whereupon, jurors entered the courtroom and
5 are now seated in the jury box.)

6 THE COURT: Mr. Murphy, I have your note you
7 reached a verdict.

8 THE FOREMAN: Yes.

9 Question No. 1: "Was the shipowner negligent?
10 No.

11 "Was the M/V Svenskund unseaworthy?

12 "No.

13 And No. 3: No answer and No. 4, no answer and
14 No. 5: "Did any negligence on the part of plaintiff
15 contribute to his accident?

16 "Yes."

17 No. 6: "If your answer to 5 is in the affirm-
18 tive, what percentage of plaintiff's damages is attri-
19 butable to his own negligence?" We put 100 percent.

20 "Is the shipowner entitled to indemnity from the
21 stevedore?

22 "No."

23 THE COURT: Do you want to poll the jury?

24 MR. BUSHLOW: Poll the jury.

25 THE COURT: The Court has received your verdict.

1 You said in answer to No. 1, "No."

2 No. 2: "No."

3 Answer to No. 5: "Yes."

4 Answer to No. 6: "100 percent."

5 Answer to No. 7: "No."

6 Is that your verdict Mr. Foreman?

7 THE FOREMAN: Yes.

8 THE COURT: Juror No. 2, is that your verdict?

9 JUROR NO. 2: Yes.

10 THE COURT: Juror No. 3, is that your verdict?

11 JUROR NO. 3: Yes.

12 THE COURT: Juror No. 4, is that your verdict?

13 JUROR NO. 4: Yes.

14 THE COURT: Juror No. 5, is that your verdict?

15 JUROR NO. 5: Yes.

16 THE COURT: Juror No. 6, is that your verdict?

17 JUROR NO. 6: Yes.

18 THE COURT: Well, thank you ladies and gentle-
19 men. You are a jury that is supposed to be a cross-
20 section of the population. I know you have given
21 careful attention to the matter. I know you couldn't
22 talk about the case. You don't have to answer any
23 questions. You should not discuss the deliberation in
24 the jury room.

25 I had some question whether to say anything about

compensation rights because there was a reference to compensation somewhere in the evidence, although we try to keep that out, because the rule is that if a plaintiff, seaman or a stevedore, longshoreman, refuses something from the ship and the ship gets it back from the stevedore, then the plaintiff must pay back to the stevedore anything that he has refused by way of compensation under the Longshoreman and Harbor Workers Act, and that would have put a lien of about \$10,000 on any recovery that was obtained here.

The plaintiff is receiving some \$450 a month in pension and \$230 or so in Social Security, so he's not penniless, but he's left without any further recovery.

We hope that whatever pains he suffers will be slight. The law was changed in 1972 so now longshoremen cannot collect indirectly. This was a case under the old law. They don't usually take this long to come to trial. It was two years wait before the plaintiff brought an action and then I've been delayed on a criminal action.

Leave your verdict please with Mr. Giokas, and Mr. Murphy, you take the cards for everyone downstairs and probably you won't be needed again.

MR. TESTA. I would like to thank the jury for

1 ITO.

2 MR. KAIN: I think we all would.

3 MR. BUSHLOW: Yes.

4 THE COURT: I think that's appropriate. When I
5 tried to thank a judge some years ago he said don't
6 thank me, he said I just do what I think is right.
7 I'm sure you just did what you thought was right.8 (Whereupon, the Court stood in recess for the
9 day.)

10 * * *

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FORM OF VERDICT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

GUISEPPE DI FORTUNATO,

Plaintiff,

- against -

STOCKHOLM REDERI A/B SVEA,
"M/V SVENSKUND,"

Defendant.

FORM OF VERDICT

-----X 72-C-1441

REDERI A/B SATURNAS,

Third-Party
Plaintiff,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party
Defendant.

-----X

QUESTIONS FOR JURY FINDINGS

1. Was the shipowner negligent? YES NO
2. Was the M/V SVENSKUND unseaworthy? YES NO
3. If your answer to (1) or (2) is the affirmative, was such negligence or unseaworthiness a proximate cause of plaintiff's accident? YES NO

FORM OF VERDICT

4. If your answer to (3) is in the affirmative, what is the total amount of plaintiff's damages?

\$ _____

5. Did any negligence on the part of plaintiff contribut to his accident?

YES x NO _____

6. If your answer to (5) is in the affirmative, what percentage of plaintiff's damages is attributable to his own negligence?

100 %

7. Is the shipowner entitled to indemnity from the stevedore?

YES _____ NO x

Dated: January 29, 1975

TAFT MURPHY

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT

For The

EASTERN DISTRICT OF NEW YORK

-----X
GUISEPPE DI FORTUNATO,

Plaintiff, :

vs. :

STOCKHOLM REDERI A/B SVEA, "M/V SVENSKUND" :

Defendant. :

-----: JUDGMENT
REDERI A/B SATURNAS,

72-C-1441

Third-Party Plaintiff :

vs. :

INTERNATIONAL TERMINAL OPERATING CO., INC. :

Third-Party Defendant. :

-----X
This action came on for trial before the Court and a jury, Honorable ORRIN G. JUDD, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the defendant and against the plaintiff and for the third-party defendant and against the third-party plaintiff.

It is Ordered and Adjudged that plaintiff recover nothing of defendant and that plaintiff pay costs when taxed and that the case

JUDGMENT ON JURY VERDICT

is DISMISSED, except as to the third party's claim for counsel fees.

Dated at BROOKLYN, NEW YORK, this 30th day of JANUARY, 1975.

PLAINTIFF's NOTICE OF
MOTION TO SET VERDICT ASIDE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
GIUSEPPE DI FORTUNATO,

Plaintiff,

72Civ.1441

- against -

STOCKHOLM REDERI A/B SVEA,
"M/V SVENSKUND,"

Defendant.

-----X
REDERI A/B SATURNAS,

NOTICE
OF
MOTION

Third-Party
Plaintiff,

- against -

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party
Defendant.

-----X
SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of IRVING B. BUSHLOW, sworn to the 10th day of February, 1975, and upon all the papers filed and proceedings had herein, the undersigned will move this Court, at a term for motions thereof, HON. ORRIN G. JUDD, District Court Judge, presiding, to be held at the Courthouse, 225 Cadman Plaza, Brooklyn, New York, Courtroom 11, Sixth Floor, on the 28th day of February, 1975, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order,

PLAINTIFF'S NOTICE OF
MOTION TO SET VERDICT ASIDE

pursuant to Rule 59 and Rule 60(b) of the Federal Rules of Civil Procedure,

(a) setting aside and vacating the verdict in favor of defendant, as well as the judgment entered thereon in favor of defendant, and

(b) directing a new trial.

Dated: Brooklyn, New York
February 10, 1975

Yours, etc.

IRVING B. BUSHLOW
Attorney for Plaintiff
26 Court Street
Brooklyn, New York 11242
Tel: (212) MA-5-1336
JA-2-7446

TO: HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant and Third-Party
Plaintiff STOCKHOLM REDERI A/B SVEA,
"M/V SVENSKUND" and REDERI A/B SATURNAS
One State Street Plaza
New York, New York 10004

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant
INTERNATIONAL TERMINAL OPERATING CO., INC.
801 Second Avenue
New York, New York 10017

AFFIDAVIT IN SUPPORT
OF PLAINTIFF's MOTION
TO SET VERDICT ASIDE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
GIUSEPPE DI FORTUNATO,

Plaintiff,
:
- against -

STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND,

Defendant.

AFFIDAVIT

-----X
REDERI A/B SATURNAS,

Third-Party Plaintiff, :
- against -

INTERNATIONAL TERMINAL OPERATING CO., INC., :

Third-Party Defendant. :

-----X
STATE OF NEW YORK) SS:
COUNTY OF KINGS)

IRVING B. BUSHLOW, being duly sworn, deposes and says:

Your deponent is the attorney for the plaintiff herein, and makes this affidavit in support of an application, pursuant to Rule 59 and Rule 60(b) of the Federal Rules of Civil Procedure, for an order of this Court, (a) setting aside and vacating the verdict in favor of defendant, as well as the judgment entered thereon in favor of defendant, and (b) directing a new trial.

AFFIDAVIT IN SUPPORT
OF PLAINTIFF's MOTION
TO SET VERDICT ASIDE

The action is for damages for personal injuries sustained by plaintiff as a result of the unseaworthiness of defendant's vessel and defendant's negligence.

The motion has been prompted by disclosures made to your deponent immediately following the verdict, by two of the jurors who returned the verdict, Mr. George Alper, juror #6, and Mr. Taft Murphy, juror #1. The disclosures were immediately reported by your deponent to the District Judge, who was in chambers.

The disclosures - which are dealt with formally in a separate section below - revealed the following facts:

(1) The verdict had been influenced, to plaintiff's prejudice, by matters extraneous to the case - namely, matters not in evidence, but which nevertheless bore directly and materially upon vital matters in evidence and crucial issues in the case. Specifically, during the deliberations of the jury, Mr. Alper had communicated to the other jurors, in the role of a witness - more particularly, as an expert witness - facts concerning his personal and private experience and observations during World War II, when he had been attached to an embarkation unit and had overseered loading and unloading operations involving material and supplies for the army. The case herein involved loading and unloading operations.

AFFIDAVIT IN SUPPORT
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At the same time, Mr. Alper also communicated to the other jurors certain conclusions and opinions adverse to plaintiff's theories of liability herein, which the jurors thereupon also adopted as their own, concerning the propriety of conditions identical in kind to those involved in the case at bar, and which formed the basis of plaintiff's claims - namely, the presence of broken or spilled cargo, water, dunnage and broken pallets in work areas. Plaintiff had been injured while at work on board defendant's vessel by slipping and falling on broken or spilled cargo, water, dunnage and broken pallets in the area where he had been checking and marking cargo.

Mr. Alper communicated to the other jurors his conclusions and opinions, based on his personal and private experiences and observations - and which conclusions and opinions the other jurors also adopted as their own - that the presence of said substances did not render the work area unfit or unsafe or the ship unseaworthy, or impose any responsibility on the shipowner, and also did not constitute negligence on the part of the shipowner. Furthermore, Mr. Alper told the rest of the jurors that if, from time to time, spilled or broken cargo, water, dunnage and broken pallets which he had observed, had to be cleared away, it was the responsibility of the workers to do so, and that it was the workers who had done so. Finally, Mr. Alper said, the workers assumed the risk of any condition created by the presence of said substances.

AFFIDAVIT IN SUPPORT
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The post-verdict disclosures by Mr. Alper and his fellow juror, Mr. Taft Murphy, juror #1, also revealed that Mr. Alper had been ineligible to serve as a juror, but had withheld from the Court and counsel said fact. Specifically, notwithstanding the fact that the voir dire had been directed, among other things, as identifying - for the purpose of eliminating as jurors - members of venire who, or members of whose families, were or had previously been engaged in waterborne commerce, and/or in loading or unloading ships, and notwithstanding the further fact that the Court had, on its own motion, excused a member of the venire, Mrs. Mary DeLuca, when she revealed that her husband was or had been a longshoreman, and that this had taken place while Mr. Alper was present, Mr. Alper did not disclose to Court or counsel the facts related above concerning his background, experiences and observations with respect to the loading and unloading of ships, as well as conditions related thereto, nor did he disclose to Court or counsel the conclusions and opinions which he held concerning the propriety of the presence of spilled or broken cargo, water, dunnage and broken pallets in work areas, etc., etc.

The post-verdict disclosures by Mr. Alper and Mr. Murphy are dealt with formally in a separate section below.

AFFIDAVIT IN SUPPORT
OF PLAINTIFF's MOTION
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Timeliness of the motion

The judgment herein was entered January 31, 1975.

The motion herein is being made on February 10, 1975, or within ten (10) days of the entry of judgment, as required by Rule 59(b) of the Federal Rules of Civil Procedure, and within one year, as required by Rule 60(b) of the Federal Rules of Civil Procedure.

Nature of Action

Plaintiff, a longshoreman, employed by the third-party defendant, a stevedore, was injured while at work on board the defendant's vessel (see charge, pp. 4,8,9). *

Facts which the evidence permitted
the jury to find, and as also re-
flected in the Court's charge

The evidence permitted the jury to find the following facts, which are also reflected in the Court's instructions: As already indicated, plaintiff, a longshoreman, employed by the third-party defendant, a stevedore, was injured while at work on board a vessel owned by defendant (charge, pp. 8, 9). He was at the time

* A copy of the transcript of the charge and subsequent proceedings, including the verdict, is annexed hereto, made a part hereof and marked Exhibit "A". As appears later in this memorandum, the Court's instructions are of exceptional importance in this motion.

AFFIDAVIT IN SUPPORT
OF PLAINTIFF's MOTION
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carrying out the duties of a sorter, checking and marking cargo - specifically, bags of tapioca flour - on the 'tween deck, preparatory to the cargo being unloaded or discharged (charge, pp. 8, 9). The area in which plaintiff was working was littered with tapioca flour (as a result of having spilled out of torn or broken bags), water (which had accumulated as a result of sweating in the hold due to the closing of the hatch, and/or condensation from refrigeration units in the deep tanks below), dunnage and broken pallets (charge, pp. 9, 10, 11, 14, 23). While engaged in checking and marking cargo, plaintiff slipped and fell as a result of the presence of said substances (charge, pp. 23, to be read with 9, 10, 11, 14).

The Court's instructions concerning
unseaworthiness, negligence and
contributory negligence

The Court instructed the jury that if they found the substances referred to had been present in the area where plaintiff was at work - and the evidence overwhelmingly warranted the jury in so finding - they should then determine whether or not the condition created by these substances constituted an unsafe and dangerous condition, rendering plaintiff's place of work unfit and unsafe and the ship unseaworthy (charge, pp. 9-10, 10-11, 11-12, 18-19, 25, 25-26), and/or also constituted negligence on the part of the defendant shipowner (charge, pp. 12, 11-12, 18-19, 14-15, 25). Determination of the latter question depended, in turn, on the jury's determination

AFFIDAVIT IN SUPPORT
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of the question whether or not defendant knew or should have known of the presence of said substances (charge, pp. 11, 12, 25).

The Court further instructed the jury that if they determined that the presence of said substances rendered the ship unseaworthy and/or constituted negligence, they were then to determine whether or not the said condition was a proximate cause of plaintiff's slipping and falling (charge, pp. 14-15).

The Court further instructed the jury that they were to determine whether or not plaintiff had been guilty of negligence contributing to the accident, and if he had, they should then determine in percentage terms, from zero to 100, the extent to which defendant's negligence and plaintiff's contributory negligence had respectively been responsible for the accident (charge, pp. 12-13, 14, 15, 8).

The Court's admonitions to the jury that the verdict was to be predicated solely upon the evidence and the Court's instructions, and that the jury was not to take into consideration matters not in evidence.

The Court admonished the jury that in deliberating upon their verdict, they were to consider only the evidence and the Court's instructions (charge, pp. 4, 6), and that they were not to consider matter not in evidence (charge, pp. 28-29).

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S
MOTION TO SET VERDICT ASIDE

The verdict in the form of
answers by the jury to
written interrogatories
submitted to them by the
Court

The Court instructed the jury to return a verdict in the form of answers to interrogatories which were contained in a "FORM OF VERDICT" which they were given (charge, p. 30).

The jury, in response to said interrogatories, found (1) that the shipowner was not negligent, (2) that the vessel was not unseaworthy, (3) that plaintiff's negligence had contributed to the accident, and (4) that his negligence had contributed to the accident to the extent of 100% (transcript, p. 46). *

The post-verdict disclosures
by two of the jurors who
returned the verdict

Immediately following the verdict, your deponent spoke to Mr. Alper, juror #6, concerning the verdict. While your deponent and Mr. Alper were engaged in conversation, two other jurors, Mrs. Miller, juror #5, and Mr. George C. Knobal, Jr., juror #4, appeared, and your deponent invited them to join the conversation, but both of them declined, stating that Mr. Alper "speaks for all of us". A moment or so later, while your deponent and Mr. Alper were still engaged in conversation, juror #1, Mr. Taft Murphy, appeared and joined in the conversation. Mr. Alper informed your deponent of the

* The jury also found that the defendant was not entitled to indemnity from the third-party defendant, the stevedore (transcript, p. 46).

AFFIDAVIT IN SUPPORT
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following facts, and he and Mr. Murphy also told your deponent that Mr. Alper had also informed the rest of the jury of said facts: - During World War II, while in the military service of the United States, he had been attached to an embarkation unit. The work of the unit, he said, consisted in getting material and supplies to the army and involved the loading and unloading of ships.

Mr. Alper stated that he had been present aboard vessels during the loading and unloading operations. During the entire period of such service, he said, the presence in the hold or holds - more particularly, in work areas - of spilled or broken cargo, water, dunnage and broken pallets, was usual, common, to be expected and that these conditions did not render the areas where the substances were found either unsafe or dangerous, nor did the conditions place any responsibility upon the owners of the vessels. Furthermore, he added, if said substances were from time to time required to be cleared away, it was the responsibility of the workers to do so, and, in fact, it was the workers who did so.

Moreover, Mr. Alper said, the workers assumed any risk involved in the conditions created by the presence of said substances. Indeed, said Mr. Alper, plaintiff had assumed any risk created by the presence of the spilled or broken cargo, water, dunnage and broken pallets.

AFFIDAVIT IN SUPPORT
OF PLAINTIFF's MOTION
TO SET VERDICT ASIDE

Mr. Alper then stated to deponent, with Mr. Murphy standing by and listening, that he, Mr. Alper, had related the foregoing facts of his experiences, observations and knowledge, as well as his aforesaid conclusions and opinions, to the remaining members of the jury, and that they had agreed with his conclusions and opinions.

At this point, Mr. Murphy interjected, stating that Mr. Alper had informed him and the remaining members of the jury of the foregoing facts and opinions, and that in view of Mr. Alper's experience, observations and knowledge in the field of loading and unloading vessels, he, Mr. Murphy, and the remaining members of the jury had agreed with Mr. Alper's conclusions and opinions.

The foregoing disclosures by Mr. Alper and Mr. Murphy, as stated above, were made to your deponent at a time when two other jurors, Mrs. Miller, juror #5, and Mr. Knobal, Jr., juror #4, had appeared while your deponent was engaged in conversation with Mr. Alper, and had declined your deponent's invitation to join the conversation, but stated that Mr. Alper "speaks for all of us".

The immediate report of said events by plaintiff's counsel
to the court

Immediately following said disclosures, your deponent returned to the court, where the District Judge was in chambers

AFFIDAVIT IN SUPPORT
TO PLAINTIFF's MOTION
TO SET VERDICT ASIDE

and advised him of the foregoing facts.

The significance of the jurors' disclosures and the effect thereof upon the verdict - namely, the total invalidation thereof - as well as upon the eligibility of Mr. Alper to serve as a juror, particularly in view of the fact that he had not previously disclosed the facts of his background, experience, observations, knowledge and opinions to the Court of counsel.

It is readily apparent from the recital of the disclosures that the verdict cannot stand because it rests upon matters not in evidence and thus extraneous to the case, but nevertheless, bearing directly and materially upon vital matters in evidence and crucial issues in the case - namely, Mr. Alper's background, experience, observations, and opinions concerning matters of the same kind as those involved in the case at bar. It also appears that in arriving at the verdict in said case, the jury acted contrary to the Court's instructions that the jury was to determine the questions upon the basis of the evidence in the case (charge, pp. 4, 6), and not upon evidence not in the case (charge, pp. 28-29).

That the verdict, thus arrived at, was highly prejudicial to plaintiff is readily demonstrated. Although (a) the evidence permitted the jury to find that the area in which plaintiff

AFFIDAVIT IN SUPPORT
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TO SET VERDICT ASIDE

worked and slipped and fell was littered with spilled or broken cargo, water, dunnage and broken pallets (charge, pp. 9, 10, 11, 14, 23), and (b) the Court instructed the jury that if they found that the area was littered with said substances, they should then determine whether the work area was unfit and unsafe, and the ship, therefore, unseaworthy (charge, pp. 9-10, 10-11, 11-12, 18-19, 14-18, 25, 25-26), and/or constituted negligence on the part of the defendant shipowner (charge, pp. 12, 11-12, 18-19, 14-15, 25), nevertheless, as is evident from the jurors' disclosures, the jury, even if it found that the area was littered with said substances, never determined, upon the basis of the evidence in the case, the question whether said condition rendered the area unfit and unsafe and the vessel unseaworthy, and/or constituted negligence on the part of the defendant. Instead, as is evident from the jurors' disclosures, even if the jury found that said substances had been present in plaintiff's work area, they simply determined, upon the basis of matters not in evidence and thus extraneous to the case - namely, Mr. Alper's experiences, observations and opinions - that the presence of the substances did not render the work area unfit or unsafe or the ship unseaworthy, and did not constitute negligence on the part of the defendant shipowner, doing so contrary to the Court's instructions to decide the questions in the case on the basis of the evidence in the case (charge, pp. 4, 6), and

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not upon evidence not in the case (charge, pp. 28-29). And in this connection, it must be remembered, as the jurors' disclosures reveal, the jury reached said conclusions in reliance also upon Mr. Alper's opinion - founded upon his personal and private experiences, observations and knowledge - that plaintiff had assumed any risk involved in the presence of said substances, notwithstanding the fact that the jury, in doing so, disregarded the instructions to the contrary given to them by the Court, to the effect that plaintiff did not assume the risk of an unsafe place in which to work or an unseaworthy condition (charge, p. 8).

Moreover, the jury, in arriving at its verdict that the ship was not unseaworthy, because of Mr. Alper's experiences and observations, and particularly, his opinion, with which they agreed, that the presence of spilled or broken cargo, water, dunnage and broken pallets did not render the area where said substances were found, unfit or unsafe, and that from time to time, if the substances were required to be cleared away, it was the responsibility of the workers to do so, and that in fact it was the workers who carried out said task or tasks - all matters not in evidence and thus extraneous to the case - the jury, in thus arriving at its verdict, also disregarded the Court's instructions that the Safety and Health Regulations of the United States Department of Labor imposed upon the defendant

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shipowner herein the non-delegable duty of seeing to it that "slippery conditions should be eliminated as they occur, and loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area", notwithstanding the fact that the defendant shipowner had not created the condition (charge, 11-12, 18-19).

Furthermore, in finding that the ship was not unseaworthy, because of (a) Mr. Alper's personal and private experiences, observations and opinions, with which the jury agreed, that if substances like spilled or broken cargo, water, dunnage and broken pallets were from time to time required to be cleared away, it was the responsibility of the workers to do so, and in fact, it was the workers who performed said task or tasks, and (b) the absence of any evidence that plaintiff had attempted to clear away the broken or spilled cargo, water, dunnage and broken pallets, the jury not only disregarded the Court's instructions to determine all questions on the basis of the evidence in the case (charge, pp. 4, 6), and not on the basis of evidence not in the case (charge, pp. 28-29), but, in addition, also disregarded the Court's instructions that "if the plaintiff longshoreman was negligent and didn't take reasonable steps to protect himself from danger, this doesn't bar him from recovering from injuries that resulted from an unseaworthy vessel or gear" (charge, p. 8).

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Similarly, in finding that plaintiff's negligence had contributed to the accident, and to the extent of 100%, upon the basis of (a) Mr. Alper's observations and opinions, with which the jury agreed, that it was the responsibility of the workers to clear away broken or spilled cargo, water, dunnage and broken pallets, and that in fact, as he had observed, it was the workers who did so, the jury not only disregarded the Court's instructions to decide the case upon the basis of the evidence (charge, pp. 4, 6) and not upon the basis of evidence not in the case (charge, pp. 28-29), but it also disregarded the Court's instructions that it was the duty of the defendant shipowner and third-party defendant stevedore, as mandated by Safety and Health Regulations of the United States Department of Labor, to eliminate slippery conditions as they occur, and to see to it that said substances were collected as the work progresses, and be kept clear of the immediate work area (charge, pp. 11-12, 18-19).

Similarly, in finding that plaintiff's negligence had contributed to the accident, and to the extent of 100%, upon the basis of (a) Mr. Alper's observations and opinion, with which the jury agreed, that it was the responsibility of the workers to clear away spilled or broken cargo, water, dunnage and broken pallets, and that, in fact, it was the workers who had done so, and (b) the absence of any evidence that plaintiff had attempted to clear away the spilled

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or broken cargo, water, dunnage and broken pallets, the jury not only disregarded the Court's instructions to decide the case upon the basis of the evidence (charge, pp. 4, 6), and not upon the basis of the evidence not in the case (charge, pp. 28-29), but the jury also disregarded the Court's instructions that in determining whether or not any negligence on the part of plaintiff had contributed to the accident, they should determine whether or not plaintiff had acted as a reasonable person would have done (charge, pp. 12-13), and had used reasonable care (14, 8), upon the basis of the evidence in the case (charge, pp. 4, 6), and not upon the basis of evidence not in the case (charge, pp. 28-29).

From all the foregoing, it can be seen that the verdict was influenced by matters extraneous to the case, - that is, matters not in evidence, but nevertheless bearing directly and materially upon vital matters in evidence and crucial issues in the case - and that this resulted in incalculable prejudice to plaintiff.

The ineligibility of Mr. Alper to serve as a juror, which was not, however, disclosed to the Court or counsel until Mr. Alper's post-verdict disclosures

The voir dire made it unequivocally clear that the Court desired to identify, for the purpose of eliminating members of the venire, or members of whose families, were or had been engaged

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in waterborne commerce, or in loading and unloading vessels - let alone, persons who, like Mr. Alper, held fixed opinions concerning vital matter in the case. Indeed, one person, Mr. Mary DeLuca, had been excused by the Court, on its own motion, when she revealed that her husband was or had been a longshoreman. Moreover, this had taken place in the presence of Mr. Alper.

Notwithstanding said facts, however, Mr. Alper did not disclose to the Court or counsel that, as shown above, he had during the last World War been attached to an embarkation unit, had been engaged in overseeing the loading and unloading of ships, and had made observations and had formed opinions concerning matters of the same kind as those involved in the case at bar, but adverse to plaintiff's theories of liabilities. Moreover, he had later communicated said observations and opinions to the remaining members of the jury, who had adopted said opinions as their own, and the verdict had been improperly influenced by said extraneous matter.

It would be difficult to conceive of conduct more prejudicial to a party.

Conclusion

For all the foregoing reasons, your deponent respectfully prays that the Court set aside and vacate the verdict, as well as the judgment entered thereon, and order a new trial.

AFFIDAVIT IN SUPPORT
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IRVING B. BUSHLOW

Sworn to before me this
10th day of February, 1975

Marilyn Levine (Goldstein)

Marilyn Levin
Commissioner of Deeds
City of New York 2-2154
Certificate filed in New York County
Commission Expires Sept. 1, 1975

DEFENDANT'S AFFIDAVIT IN OPPOSITION
TO PLAINTIFF'S MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

GUISEPPE D'FORTUNATO, :
Plaintiff, : AFFIDAVIT

-against- : 72 Civ. 1441

STOCKHOLM REDERI A/B SVEA,
"M/V SVENSKUND", :
Defendant. :
- - - - - x

REDERI A/V SATURNAS,
Third-Party Plaintiff, :
-against- :
INTERNATIONAL TERMINAL OPERATING CO.,
INC., :
Third-Party Defendant. :
- - - - - x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM P. KAIN, JR., being first duly sworn, deposes and
says as follows:

That he is an attorney admitted to practice before this Court,
and is a member of the firm of Haight, Gardner, Poor & Havens, attorneys for

DEFENDANT'S AFFIDAVIT IN OPPOSITION
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defendant and third-party plaintiff. This affidavit is respectfully submitted in opposition to plaintiff's motion pursuant to Rules 59 and 60 (b) of the Federal Rules of Civil Procedure for an order setting aside the jury verdict and the judgment in favor of the defendant and granting plaintiff a new trial.

This motion arises out of plaintiff's counsel's understandable dissatisfaction with the jury verdict against his client and his interrogation, immediately after the jury left the courtroom, of two of the jurors. Your deponent noticed Mr. Bushlow leaving the courtroom immediately after this Court dismissed the jury. Mr. Bushlow was not present in the courtroom when Mr. Testa, the Court and your deponent discussed the post-trial motions the parties intended to bring on. When your deponent was leaving the courthouse through the lobby, he noticed Mr. Bushlow talking to Mr. Alper, juror number six.

From Mr. Bushlow's interrogation of the two jurors and their responses, related to the Court from Mr. Bushlow's biased point of view, plaintiff's counsel has fashioned an argument of sorts: That Mr. Alper's alleged relating of his general background concerning loading and unloading ships to the other jurors introduced extraneous matter into the jury deliberations, which allegedly influenced the jury to plaintiff's prejudice. It is defendant's position that this argument and the allegations upon which it rests are utterly without merit, but merely reflect the lengths to which disappointed litigants and their counsel will go to overturn an adverse verdict, thereby threatening

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the stability of the jury system and the privacy of the jury room.

At the outset, it cannot be emphasized too strongly that Mr. Bushlow's affidavit is utterly incompetent and inadmissible. He is the attorney for the plaintiff. Your deponent does not wish to imply that what Mr. Bushlow did was unethical, (A.B.A. Code of Professional Responsibility EC 7-29). Nonetheless, the affidavit of an attorney should not be received when the testimony of eyewitnesses, the two jurors interrogated by him, is available. Moreover, the entire factual content of Mr. Bushlow's affidavit is hearsay.

The unreliability of Mr. Bushlow's affidavit, or that of any attorney testifying as to hearsay, is suggested by your deponent's limited contact with Mr. Alper after the trial. After Mr. Testa, the Court, and your deponent had completed our discussions of post-trial motions, your deponent prepared to leave the courthouse with your deponent's associate, Mr. Haven. In the lobby of the courthouse, your deponent encountered Mr. Bushlow conversing with Mr. Alper. Your deponent exchanged pleasantries with them and Mr. Alper, completely unsolicited, volunteered to your deponent that he had been a combat-infantryman during World War II and in this capacity he had the opportunity to observe the loading and unloading of ships by both their naval crews and Army port battalions. He made no mention, as Mr. Bushlow alleges, of being an "overseer". Mr. Alper stated that whenever the ships he saw carried bagged cargoes there was always some leakage. He also stated that the cargo hatches he saw generally had some broken dunnage on the deck and

DEFENDANT'S AFFIDAVIT IN OPPOSITION
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that persons working there would kick pieces of dunnage out of their way when they encumbered the deck. Mr. Alper further stated that all the jurors thought Mr. DiFortunato was exaggerating; that they could not quite understand why he was the only one of a number of the men working there who fell; that they felt other gang members should have been called by plaintiff to corroborate his testimony as to the alleged conditions in the No. 3 'tween deck. This is the full extent of your deponent's recollection as to the unsolicited statements made by Mr. Alper to your deponent.

Your deponent distinctly recalls that at no time in your deponent's presence did Mr. Alper say anything like longshoremen assume the risk of loose flour, broken pallets, and broken dunnage. At no time did your deponent ask Mr. Alper questions, although your deponent's associate, Mr. Hazen, did inquire as to when and where Mr. Alper was to catch the train he was concerned about. After this exchange, Mr. Taft Murphy arrived upon the scene and was immediately asked questions by Mr. Bushlow the substance of which your deponent did not overhear, as he was trying to extricate himself from the conversation with Mr. Alper. Thereafter two other jurors, Mrs. Miller and Mr. Rocco - not Mr. Knakal - passed by on their way out of the courthouse, stating in reply to Mr. Bushlow's attempt to involve them in his discussion: "They speak for all of us." Immediately thereafter, your deponent said farewell to Mr. Alper and left for his office. Mr. Alper and Mr. Murphy remained in the

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lobby with Mr. Bushlow. Your deponent is not relating this scenario as evidence in chief, but merely to demonstrate the quite divergent recollections two honest men may have of the same conversation, and how unreliable is an affidavit based thereon.

It is defendant's position that the statements of the jurors are incompetent to impeach their verdict. Even assuming the accuracy of Mr. Bushlow's allegations, there is no showing of prejudice to warrant a new trial. Defendant insists that if this Court allow the stability of the jury system to be so undermined, that it not allow this to be accomplished on the strength of the affidavit, replete with hearsay, of the attorney for a disappointed litigant. The Court is respectfully referred to defendant's Memorandum of Law, Point I, in this regard.

It is defendant's further position that the contents of Mr. Bushlow's affidavit, the statements of jurors Alper and Murphy as to what transpired during jury deliberations, are incompetent to impeach the jury verdict. The Court is respectfully referred to defendant's Memorandum of Law, Point II, on this issue. With no competent evidence in support of his motion, then, plaintiff's motion must necessarily fail.

Additionally, it is defendant's position that, assuming the accuracy of Mr. Bushlow's allegations, there is no showing of prejudice even approaching the quantum necessary to warrant a new trial. All that Mr. Alper

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allegedly related to his fellow jurors was his general background and knowledge of ship loading and unloading operations acquired some 30 to 35 years ago. The Court is respectfully referred to defendant's Memorandum of Law, Point III, for the rule that matter related to other jurors is prejudicial only when it involves specific facts about a specific party, and not mere general background information or common sense observation, as in the case at bar.

Moreover, the matter which allegedly infiltrated the jury deliberations through Mr. Alper was decidedly not dehors the record. Captain William Wheeler, a maritime expert called by the defendant, testified at length concerning loading and unloading operations involving bagged flour on cargo ships. He testified that ships carrying tapioca flour always have some breakage, which is anticipated to be in the range of two to three percent. He also testified that longshoremen, usually a cooper, were required to clean up the sweepings of loose flour. He further testified that it was usual and customary to find some pallets and broken dunnage in a cargo hold. Thus Mr. Alper's alleged observations and general background information had ample support in the record.

Mr. Alper's alleged statement that longshoremen assume the risk of working in such conditions was not contrary to the Court's instructions. It should be borne in mind that the jury thought the condition as described by Mr. DiFortunato was exaggerated. Captain Wheeler testified that it was usual and customary to have loose flour and some breakage. Thus, there was ample

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evidence from which the jury could and did find that the condition that actually existed in No. 3 hatch 'tween deck was usual and customary. This Court correctly charged the jury: "The work of a longshoreman is hazardous and he must bear the ordinary risk of his occupation, so that you can find recovery only if the accident resulted from unseaworthiness and not the ordinary usual risk of plaintiff's job." Since the jury found the condition to be usual, it involved a usual risk which plaintiff assumed. Nor did the jury ignore the Court's charge on the Safety and Health Regulations. Mr. Bushlow simply misstates the Court's charge. This Court charged that the regulations were binding on the stevedore, not the shipowner.

Indeed, the entire jury verdict for the defendant is amply supported by the trial record. This support is tacitly admitted by the plaintiff in failing to move for a new trial on the ground that the verdict was against the weight of the evidence. Plaintiff's counsel apparently concedes the futility of such an argument.

Finally, it is defendant's position that Mr. Alper was eligible to serve on the jury, and that he withheld no material facts reflecting on his eligibility. First, it must be pointed out, that according to deponent's trial notes, Mrs. De Luca, the spouse of a retired longshoreman, was challenged peremptorily by the defendant, and was not excused by the Court. Nor did the voir dire put Mr. Alper on notice to disclose the fact, if indeed he recalled it

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at that time, that 30 to 35 years ago as an infantryman in World War II he had observed the loading and unloading of ships. The questions propounded to the jury by the Court sought information as to whether prospective jurors or their immediate relatives were engaged in maritime commerce. It is deponent's view that this line of inquiry was directed in eliminating jurors who might have some relationship with the maritime industry which might be conducive to sympathy for or prejudice against one of the parties. A longshoreman might be sympathetic to a fellow dockworker which could prevent him from impartially passing on his colleague's personal injury case. It is inaccurate to characterize this line of inquiry as aimed at the exclusion of any prospective jurors who may have had some familiarity with maritime matters. Even if the voir dire was so intended, it was clearly not so apparent to prospective jurors to require them to volunteer information as to their experiences 30 to 35 years ago. Mr. Alper is a retired businessman. To anyone's knowledge, he never was employed in maritime commerce, nor were any of his close relatives. It is respectfully submitted that if Mr. Bushlow desires a sterilized laboratory for a jury, totally devoid of anyone with maritime knowledge, to which his clients may present their implausible descriptions of what happens on ships during loading and unloading, it is incumbent upon him to request the Court to ask such questions on the voir dire as Mr. Bushlow thinks necessary. At any rate, it is difficult to see any prejudice to Mr. DiFortunato by having a juror with a smattering of maritime knowledge try his case. The state courts and this Court, under its

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diversity jurisdiction, try thousands of automobile accident cases to jurors more or less expert in automobile operation and safety. Yet disappointed litigants do not attempt to upset jury verdicts on the ground that this general background information contaminated the jury trial. Likewise, the mere informing of the jury process with some general background information on the loading and unloading of ships does not deprive a party of an impartial jury trial.

WHEREFORE, your deponent respectfully requests that plaintiff's motion be denied in all respects.

WILLIAM P. KAIN, JR.

Sworn to before me this
20th day of February, 1975.

Notary Public

ANNE M. DORIS
Notary Public, State of New York
No. 31-0999575
Qualified in New York County
Term Expires March 30, 1975

MEMORANDUM, DECISION AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

GIUSEPPE DI FORTUNATO, :
Plaintiff, : 72-C-1441

- against - :
Defendant.

STOCKHOLM REDERI A/B SVEA, :
M/V SVENSKUND,

Defendant.

:

-----X

REDERI A/B SATURNAS, :
Third-Party Plaintiff,

- against - :
Defendant.

INTERNATIONAL TERMINAL OPERATING :
CO., INC.,

May 22, 1975

Third-Party Defendant.

:

-----X

Appearances:

IRVING B. BUSHLOW, ESQ.
Attorney for Plaintiff

HAIGHT, GARDNER, POOR & HAVENS, ESQ.
Attorneys for Defendant and Third-
Party Plaintiff

By: WILLIAM P. KAIN, JR., ESQ.
JAMES M. HAZEN, ESQ.
of Counsel

MEMORANDUM, DECISION AND ORDER

Appearances (continued):

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant

By: ALBERT V. TESTA, ESQ.
of Counsel

J U D D, J.

MEMORANDUM, DECISION, AND ORDER

Two motions are before the court, each seeking to set aside the jury's verdict in this longshoreman's case. The first, by the plaintiff, asks for a new trial on the basis of affidavits as to matters considered by the jury during their deliberations. The second, by the defendant, asks for allowance of attorneys' fees from the third-party defendant in spite of the jury's verdict finding no right to indemnity.

Facts

Plaintiff's claim was that he had slipped and fallen on wet tapioca, broken dunnage, and broken pallets while he was in the hatch of a ship unloading palletized tapioca from the tropics. He asserted that this spilled cargo and debris had littered the work area for several hours in spite of complaints which he made to other longshoremen.

MEMORANDUM, DECISION AND LAW

and to the deck man. He asserted that the longshoreman superintendent had looked down the hatch and said, "Keep working, you'll be finished soon." The jury brought in a verdict for the defendant, finding no negligence on the part of the defendant, and 100 percent contributory negligence on the part of the plaintiff.

During the voir dire examination of the jury, the jurors had been asked whether they or close relatives had previously been employed in loading or unloading ships. Plaintiff asserts that one of the jurors told the other jurors during their deliberations that he had been attached to an embarkation unit during World War II, when he was a combat infantryman, and had seen loading and unloading operations, that there was often spilled or broken cargo, dunnage, and pallets, and that generally the workers had cleared it away. The juror had not disclosed such experience on his voir dire. No affidavit of any juror has been submitted.

The plaintiff served a notice of demand for jury trial with his complaint. No jury demand was made by defendant in connection with the third-party complaint, nor by the third-party defendant.

MEMORANDUM, DECISION AND ORDER

At the time of the trial, the court ruled that the issues between the defendant shipowner and the third-party defendant stevedore were not subject to a jury trial, but that it would receive an advisory verdict from the jury.

The testimony showed that plaintiff was a sorter in the hatch, marking pallets with chalk so that they could be properly placed on the pier. Although a number of the tapioca bags in the hatch were broken, the stevedores did not have a cooper in the hatch to make repairs. Apparently, none of the gang cleared away dunnage, pallets or tapioca in the working area. The stevedores' hatch boss was aware of the situation. A cargo mate for the vessel was walking back and forth on the deck, and knew that there was some tapioca spillage, but took no action.

The jury found that the shipowner was not negligent, that the ship was not unseaworthy, and that plaintiff's negligence contributed to his accident to the extent of 100 percent.

The jury also answered the final question with respect to indemnity, saying "No" to the question, "Is the shipowner entitled to indemnity from the stevedore?"

MEMORANDUM, DECISION AND ORDER

Discussion

1. Statements by a Juror

Plaintiff seeks to bring the case within one of the exceptions to the rule against impeaching a verdict by discussion of the jury's deliberations. He asserts that the juror's description of his World War II experiences constituted improper extraneous matter.

None of the many cases cited by plaintiff bears on the precise facts involved here. In Mattox v. United States, 146 U.S. 140, 12 S.Ct. 50 (1892), a verdict was upset on affidavits by jurors that bailiffs had made remarks to the jury about the defendant and that a newspaper article stating a belief that the defendant was guilty had come into the hands of the jurors during their deliberations.

In United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974), the verdict was sustained in spite of a letter written by a juror after verdict, which was at least bizarre and which persuaded a number of psychiatrists that the juror was probably incompetent. In Stephens v. City of Dayton, 474 F.2d 997 (6th Cir. 1973), a verdict was sustained in spite of evidence that one juror had told the others that he had seen the plaintiff walking in the parking lot with more agility.

MEMORANDUM, DECISION & ORDER

than he had displayed in the courtroom. In Gault v. Poor Sisters of St. Frances, 375 F.2d 539 (9th Cir. 1967), jurors' affidavits were supplied, but the court held that they showed nothing more than use of the jurors' general information in reaching a verdict. In Young v. United States, 163 F.2d 187 (10th Cir. 1947), a jury verdict was sustained in spite of jurors' affidavits; one juror had informed another that two of the defendants were associated and that one of them had killed a man, and he made similar remarks to the jury generally. In International Forwarding Co. v. Bison Freightways, Inc., 316 F. Supp. 464 (M.D. Penna. 1970), a jury verdict was sustained in spite of the fact that two jurors had visited the underpass which was involved in the accident in suit.

In this circuit, the rule against impeaching a jury's verdict by affidavits of the jurors was applied strictly in United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), cert. denied sub nom. Mittelman v. United States, 368 U.S. 984, 82 S.Ct. 599 (1962). There a jury's verdict was sustained in spite of proof that the guilty plea of a co-defendant had become known to them and that one juror had stated that this plea was evidence that the other defendants were also guilty.

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In Moore's Federal Practice, Vol. 6A, § 59.08[4], the author discusses the general rule against receiving the testimony of jurors to upset a verdict and says (pp. 148-49 of 19.3 pages) that some of the things which testimony of a juror cannot prove are:

statements by a juror as to facts within his private knowledge, except where part of his misconduct takes place outside the jury room, separate and apart from the deliberations of the jury; . . . influence of a juror or jurors upon another juror;

• • •

Jurors are customarily told that they do not leave their common sense outside when they enter the jury room and that they may consider their general experience in evaluating the evidence. The juror's experience in watching unloading operations during military service did not constitute the type of waterfront employment concerning which he had been questioned during the voir dire. His remarks, if made, were essentially the application of general experience to the facts concerning which the plaintiff and the other witnesses had testified.

Plaintiff refers to the provision in Section 606(b) of the new Federal Rules of Evidence which will permit a juror to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's

MEMORANDUM, DECISION AND ORDER

attention" The Advisory Committee's notes to the rule cite the Mattox case as an illustration of improper extraneous prejudicial information. There is no indication of any intent to extend the permissible impeachment of a jury verdict beyond what the prior law permitted.

2. Claim for Indemnity

Since the issues between the shipowner and the stevedore are different from the issues between the plaintiff and the shipowner, the plaintiff's demand for a jury trial does not mean that a jury trial is permissible on the third-party complaint. McAndrews v. United States Lines Co., 167 F. Supp. 41 (S.D.N.Y. 1958).

Advisory juries are authorized by F.R.Civ.P. 39(c), which states:

In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury. . . .

The trial court is at liberty to accept or reject the verdict of an advisory jury. Chicago & North Western Ry. Co. v. Minnesota Transfer Ry. Co., 371 F.2d 129 (8th Cir. 1967).

The jury's verdict on indemnity in this case is

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entitled to little weight. The right to indemnity is important at this stage only in relation to the shipowner's recovery of attorneys' fees, a matter which was not submitted to the jury and on which no evidence was presented. From the jury's point of view, after it had decided in favor of the shipowner, there was nothing for which the shipowner required indemnity. The jury's negative answer to the question concerning indemnity may just as well reflect this fact as any real decision on the rights between the two parties.

If the issues on the complaint and on the third-party complaint had been tried separately, it would have been the duty of the court to direct a verdict in favor of the shipowner after receiving the verdict on the main complaint. The jury's finding that plaintiff was guilty of contributory negligence shows that the accident resulted from the fault of the stevedore, since its employee's negligence is imputed to it. Mortensen v. A/S Clittre, 348 F.2d 383 (2d Cir. 1965). Even though the plaintiff's contributory negligence in Mortensen was limited to one-third, the court said that plaintiff's negligence would be imputed to his employer and was manifestly a breach of the warranty of workmanlike

MEMORANDUM, DECISION AND ORDER

performance. It said that indemnity could be denied only if there were actions by the shipowner such as to "prevent or seriously handicap the stevedore in his ability to do a workmanlike job." (Quoting from Albanese v. N. V. Nederl. Amerik Stoomv. Maats., etc., 346 F.2d 481 (2d Cir. 1965)). In spite of the shipowner's obligation to provide a safe place to work, the court held that the warranty of workmanlike performance also "imposes a duty on the stevedore or contractor to clean up the area of operations, where necessary, to make it a safe place in which to work." 348 F.2d at 385.

The Mortensen case was followed in McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334 (2d Cir. 1969), cert. denied sub nom. Golten Marine Co. v. Trelleborgs Angfartygs A/B, 395 U.S. 946, 89 S.Ct. 2020. There the jury found the ship unseaworthy but found the plaintiff negligent to the extent of one-sixth, and the court held that the jury's finding of contributory negligence was conclusive. 408 F.2d at 1336. To the same effect is Hartnett v. Reiss Steamship Co., 421 F.2d 1011 (2d Cir. 1970), where the jury found the ship unseaworthy and negligent and the plaintiff guilty of contributory negligence to the extent of one percent, and found a right to indemnity. Although the

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contributory negligence was slight, the court held that the stevedore there "was not an innocent bystander" because it was at least jointly responsible for inspecting to determine whether there were any unsafe conditions. The finding of a right indemnity was affirmed.

These cases have not been impaired by Nye v. A/S D/S Svendborg, 501 F.2d 376 (2d Cir. 1974), which the third-party defendant cites. That was not a longshoreman case, but a death action arising from negligence in the attempt to land a 350 pound service engineer on the pilot ladder of a disabled ship on a windy night. The court expressly found that the stevedore cases were not applicable. 501 F.2d at 380.

Nor does Judge Rosling's memorandum in Rodriguez v. Olaf Pedersen's Rederi A/S, 68-c-409, justify disregard of the Court of Appeals' decisions. Judge Rosling there held that the stevedore was entitled to a jury trial of the indemnity claim (there having been no waiver of jury trial) in order to determine whether there had been a breach of the stevedore's warranty of workmanlike performance, or whether workmanlike performance had been thwarted by the shipowner. Later, on a motion for summary judgment, 387 F. Supp. 754

MEMORANDUM, DECISION AND ORDER

(E.D.N.Y. 1974), Judge Neaher found that there was no evidence that the shipowner had interfered with the stevedore's performance of its warranty, that a jury verdict denying indemnity would not be legally sustainable, and that summary judgment for indemnity should be granted.

Attorneys' fees and disbursements in the defense of a longshoreman's action are recoverable by a shipowner who has successfully defended. DeGioia v. United States Lines Co., 304 F.2d 421, 426 (2d Cir. 1962).

The court determines that the jury verdict on the indemnity question was not binding. The court finds that plaintiff was negligent, that his contributory negligence is imputable to the third-party defendant, that the shipowner defendant did not interfere with the third-party defendant's performance of its obligations as stevedore, and that the defendant is entitled to indemnity against the third-party defendant to the extent of reasonable attorneys' fees.

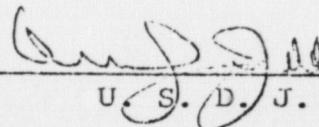
It is ORDERED:

(1) That plaintiff's motion for a new trial be denied; and

(2) That judgment be entered in favor of third-party plaintiff Rederi A/B Saturnas against third-party

MEMORANDUM, DECISION AND ORDER

defendant International Terminal Operating Co., Inc. for the amount of its attorneys' fees in the defense of the action, in an amount which may be agreed by the parties, or fixed by the court on three days' notice in the event of the parties' inability to agree within twenty days after the date of this memorandum.


U. S. D. J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
GIUSEPPE DI FORTUNATO, :

Plaintiff, :

- against - :

STOCKHOLM REDERI A/B SV :
M/V SVENSKUND, : 72-C-1441

Defendant. :
: NOTICE
: OF
: APPEAL
-----X
REDERI A/B SATURNAS, :

Third-Party :
Plaintiff, :

- against - :

INTERNATIONAL TERMINAL OPERATING CO., INC. :

Third-Party :
Defendant. :
-----X

SIRS:

PLEASE TAKE NOTICE that the plaintiff herein,
GIUSEPPE DI FORTUNATO, appeals to the Court of Appeals, for the
Second Circuit from the order of this Court, dated May 22, 1975,
(ORRIN G. JUDD, District Judge) which denied plaintiff's motion -
made pursuant to Rules 59 and 60(b) of the Federal Rules of Civil
Procedure, and within ten (10) days of the entry of the judgment
herein - for an order setting aside the verdict in favor of defendant,
and directing a new trial.

NOTICE OF APPEAL

Dated: Brooklyn, New York
June 11, 1975

Yours, etc.

IRVING B. BUSHLOW
Attorney for Plaintiff
26 Court Street
Brooklyn, New York 11242

Tel: (212) MA-5-1336
JA-2-7446

TO: HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for defendant and third party
plaintiff
One State Street Plaza
New York, New York 10004

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for third-party defendant
801 Second Avenue
New York, New York 10017

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLIAM KRONENBERGER being duly sworn deposes
and says: On October 28th, 1975 I served the
within record on appeal brief appendix on Alexander
C. L. Schwartz & Cohen the attorneys for the 3rd party defendant
respondent by leaving mailing ~~one copy~~ three copies thereof
at his office located at 801 Second Avenue
New York, New York 10017

William Kronenberger

Sworn to before me
this 28th day of
October, 1975
Lillian Weisberg

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

EDWARD TAYLOR being duly sworn deposes
and says: On October 28th, 1975 I served the
within record on appeal brief appendix on Haight
Gardner Poor & Haagen the attorneys for the Appellee + 3rd party plaintiff
respondent by leaving mailing ~~one copy~~ three copies thereof
at his office located at 1 State Street Plaza
New York, New York 10004

Edward Taylor

Sworn to before me
this 28th day of
October, 1975
Lillian Weisberg

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1976

